

mandant intended to give; and I cannot read the mandate before us without coming to the conclusion that the words "at all meetings" were not intended to be taken in any limited sense. I think that the mandate is to be read in the same way as if these words were not there. I cannot think that the granter ever contemplated that they should have a restrictive application.

Then, as regards the objection that this bankrupt though in trade and contracting large debts has kept no books, I cannot help looking upon this as a very serious objection, and if your Lordships had seen your way to inflict a severer penalty than the Sheriff-Substitute has imposed, I should not have objected. But this matter is left very much to the discretion of the Sheriff-Substitute, and it is a strong measure to interfere with his discretion. He has certainly exercised his discretion in this case very mildly, and if the penalty which he imposed had been heavier I should have concurred more easily than I now do.

LORD MURE—I am of the same opinion. As to the construction of the mandate, I think it ought to be extended so as to include acts which do not take place at formal meetings. Lord Fullerton's decided opinion in the case of *Morison* has created a precedent which has been acted on, and which we ought not now to alter.

LORD SHAND—I agree, and shall only add a few observations on two points, namely, the objection to the mandate and the merits of the question.

In dealing with the question of the meaning of the mandate, it is to be kept in view that the statute reads "vote" as including the giving of consent to a discharge. If one reads the mandate in that sense, and bearing in mind that such a consent is never in practice given at a formal meeting, I think it is a circumstance which aids one in coming to a conclusion on this matter; and adding that to the other circumstances mentioned by your Lordships, I have come to the same result as your Lordships.

Then, as to the conduct of the bankrupt, there are two points in favour of the judgment of the Sheriff-Substitute. In the first place, the report by the trustee on the bankrupt's conduct is favourable; and secondly, this sequestration was granted in August 1880, so that under the Sheriff-Substitute's interlocutor nineteen months will have elapsed before the bankrupt obtains his discharge, during which period he is unable to trade or obtain credit of any sort. Keeping that in view, I am not disposed to disturb the Sheriff-Substitute's judgment. As I understand the case, it is not one in which the bankrupt has kept no books in the strict sense. He has kept books relating to his proper business, but his property and share transactions outside his business he has carried on without books. There is a growing feeling among mercantile men that the Court should enforce the keeping of books with greater strictness, and it was that feeling which led to the recent statute being passed. I confess that if the Sheriff-Substitute had imposed a severer penalty I should have been inclined to agree with him, but, on the whole, I do not think we should interfere.

The Court adhered.

Counsel for Appellant—Macfarlane. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Respondent—Murray. Agents—J. & A. Hastie, S.S.C.

Friday, February 3.

## FIRST DIVISION.

[Lord Rutherford Clark,  
Ordinary.]

PORTPATRICK RAILWAY COMPANY v. GIRVAN AND PORTPATRICK JUNCTION RAILWAY COMPANY AND ANOTHER.

*Railway—Agreement embodied in Statute—Running Power—Payment of Rent for Running Power—Arrears—Interdict—Defence of Public Convenience.*

An Act of Parliament authorised a railway company, "and all persons or companies lawfully working or using their railway or any part thereof," to run over, work, and use with their engines, carriages, &c., and with their clerks, officers, &c., certain portions of the line of another company, in the same way and to the like extent and effect as if these portions of line had been held by the two companies jointly for their joint and separate use and benefit on equal terms in every respect. As the counterpart of this right the company enjoying it came under an obligation, embodied in the Act of Parliament, to make certain half-yearly payments of rent. The company exercised the running powers for several years, but did not make any payment of rent, having become hopelessly insolvent. In an action by the company whose line was subject to the running powers, against the other company—*held* that the pursuers were entitled to have the defenders, or anyone claiming right under them, interdicted from exercising the running powers until payment of the arrears of rent; but opinions *reserved* as to the rights of parties who might claim to exercise the powers otherwise than as representing the defenders.

The Portpatrick Railway Company was a company whose line extended from Castle Douglas to Stranraer and Portpatrick, a distance of 61 miles. In 1872 the Girvan and Portpatrick Junction Railway Company, which was a company incorporated in 1865 for the purpose of constructing a line from Girvan in Ayrshire to East Challock in Wigtownshire, obtained an Act of Parliament by which they were authorised to run over and use certain portions of the Portpatrick Company's line. The section conferring this power was in these terms—"The company" (that is, the Girvan Company), "and all companies and persons lawfully working or using their railway, or any part thereof, may from time to time run over, work, and use with their engines and carriages, waggons and trucks, and with their clerks, officers, agents, carting agents, and other servants, and for the purposes of their traffic of every description, including the reception, handling, booking,

invoicing, forwarding, and managing traffic in the same way and to the like extent and effect as if the railways or portions of railway, and works and conveniences after described, were held by the company and the Portpatrick Railway Company jointly for their joint and separate use and benefit on equal terms in every respect." The Act then proceeded to specify the portions of the Portpatrick line to which this provision was to apply. These were, in the first place, a portion of the Stranraer section extending from East Challoch to Stranraer, a distance of about eight miles; and secondly, a part of the Portpatrick section.

As the counterpart of the running powers thus conferred, the Act provided that the Girvan Company should make payment to the Portpatrick Company for the portion of the Stranraer section (to which alone this action related, the Girvan Company never having taken advantage of their rights over the Portpatrick section) of "a yearly sum equal to the interest at and after such rate upon the principal sum forming the one-half of the cost of the purchase of lands for and the original construction of the said section, as such rate and cost may be agreed on between the said companies, or failing agreement either as regards such rate of interest or the amount of such cost, as the same may be determined by arbitration in the manner provided under the provisions of the Railways Clauses Consolidation (Scotland) Act 1845 with respect to the settlement of disputes by arbitration, which yearly sum shall commence to run and be payable from the day on which the junction between the railway of the company and the Portpatrick Railway is completed and opened for traffic." It was also provided that these yearly sums should be paid in equal portions half-yearly on the 11th November and the 15th May in each year; that they should be in full of all demands by the Portpatrick Company against the Girvan Company in respect of the portion of line in question except as regards the expense of its future maintenance; and that the Girvan Company might, at any time within five years, and on payment of the principal sum on which they paid interest, become joint-owners of the portion of line over which the user extended.

The Girvan and Portpatrick Junction Railway Company was opened for traffic on 5th October 1877. It was from the first worked by the Glasgow and South-Western Railway Company, and that company exercised the Girvan Company's running powers over the Stranraer section of the Portpatrick Railway. The Girvan and the Portpatrick Companies did not agree as to the amount to be paid in respect of these powers, and the matter was, in terms of the provision above-quoted, referred to Sir Thomas Bouch, C.E., who, after a variety of procedure, issued his award on 20th July 1880, finding that the sum which the Girvan Company was due to the Portpatrick Company up to that date amounted to £7012, 6s. 11d.

The Girvan Company was never able to pay its way, as appears more fully from the reports of the case of *Haldane v. Girvan and Portpatrick Railway and Others*, March 18, 1881, *ante*, vol. xviii. p. 451, 8 R. 669; July 19, 1881, *ante*, vol. xviii. p. 711, 8 R. 1003; Dec. 10, 1881, *ante*, p. 192; and eventually, having become hopelessly insolvent, it was, on 3d July 1879, placed under

the management of James Haldane, C.A., as judicial factor appointed in terms of the 4th section of the Railway Companies Act 1867 (30 and 31 Vict. c. 126). The working agreement between the Girvan and the Glasgow and South-Western Companies expired on 31st January 1881, but was continued temporarily by the judicial factor, in order, if possible, to admit of arrangements being made for the permanent working or the disposal of the Girvan Company's line—[see the reports of the former case].

The pursuers of the present action were the Portpatrick Railway Company, with the consent and concurrence of the Caledonian Railway Company, by whom the Portpatrick line was worked. The defenders were the Girvan Company and the judicial factor on the undertaking thereof; the Glasgow and South-Western Company were also called for their interest. The pursuers sought to have the defenders, the Girvan Company and the judicial factor, ordained to make payment of the sum of £9765, 17s. 9d., being the sum of £7012, 6s. 11d. found due by Sir Thomas Bouch, together with the subsequent additions in respect of the exercise of the running powers down to the date of the action. They further asked for declarator that "failing the defenders making payment of the said sums and interest, as concluded for, and so long as the said sums or any part thereof remain unpaid, that the pursuers are entitled to the sole and exclusive possession, use, and enjoyment of that portion of the Portpatrick Railway lying between the junction of the Girvan and Portpatrick Railway therewith at East Challoch, and a point on the Portpatrick Railway;" and also that "the defenders" (*i.e.*, the Girvan Company and the judicial factor), "or anyone claiming right under them, ought and should be interdicted, prohibited, and discharged, by decree foresaid, from using the said Stranraer section and East Pier or works connected therewith by themselves, their officers or their servants, aye and until the said sums shall have been paid to the pursuers;" and for declarator that the said defenders were not entitled to use the Stranraer section henceforward except on the due and regular payment to the pursuers of the sums found due under the award by Sir Thomas Bouch, or on payment of a capital sum as the price of the user in terms of the Girvan Company's Act. None of these conclusions were directed against the Glasgow and South-Western Company.

The pursuers pleaded, *inter alia*—" (2) Payment by the defenders of the sums payable by them under the said Act of Parliament and decret-arbitral being the condition and counterpart of their right to use the Stranraer section and East Pier, they are not entitled to such use except upon payment of these sums, and the pursuers are therefore entitled to decree of declarator and interdict as concluded for."

The Girvan Company alone lodged defences, in which they pleaded, *inter alia*—" (3) In any view, the pursuers are not entitled to interdict as concluded for; and the defenders, upon paying or giving security for payment of the sum due for the current half-year, are entitled to use the pursuers' line in terms of the statutes."

The Glasgow and South-Western Company lodged a minute in which they stated "that subject to the consent of the Girvan and Portpatrick

Junction Railway Company, the Glasgow and South-Western Railway Company were prepared, and hereby undertake, so long as the working of the Girvan and Portpatrick line is in their hands, to guarantee and pay to the Portpatrick Company, from and after 1st September 1881, the interest payable to the Portpatrick Company by the Girvan and Portpatrick Company, under the award of the late Sir Thomas Bouch, for the joint user of the Stranraer section and the East Pier at Stranraer." And the Girvan and Portpatrick Company "consented to the said payment, and to the South-Western Company retaining the amount thereof out of the revenue accruing to the Girvan and Portpatrick Company under the working agreement between the companies dated 18th and 27th March 1879."

The Lord Ordinary (RUTHERFURD CLARK) pronounced this interlocutor:—"Decerns and ordains the defenders, the Girvan and Portpatrick Junction Railway Company, and James Haldane, chartered accountant, Edinburgh, as judicial factor upon the undertaking of the said Girvan and Portpatrick Junction Railway Company, jointly and severally to make payment to the pursuers of the sum of £9765, 17s. 9d., with interest, &c.; . . . and finds, declares, interdicts, and decerns in terms of the conclusions of the summons."

He added this opinion:—"The leading question in this case is, Whether the pursuers are entitled to prevent the defenders from using the Stranraer section of the pursuers' line until the consideration payable for the use is paid by the defenders? That the defenders have hitherto failed to pay the consideration is clear, and that they are unable to pay it from their own resources—at least in the immediate future—is as evident. The defenders, however, produce an undertaking on the part of the Glasgow and South-Western Railway Company, by which that company undertakes to pay the consideration for the future so long as they shall work the defenders' line, which at present they do.

"The power to use the Stranraer section is given by the Act of 1872. But by the same statute an annual consideration is payable for the use. Payment is in arrear for the last three years or thereabouts, and the only guarantee for the future is the undertaking given by the Glasgow and South-Western Railway Company. The defenders themselves seem to be in a hopeless condition of insolvency.

"The defenders maintain that the arrears form a simple debt, and that they are entitled to continue to exercise their statutory powers, leaving any debt which has been incurred, or which may yet be incurred, to be recovered by the pursuers as best they may. I cannot assent to that view. No doubt the right to use the pursuers' line is given to the defenders by statute; but they are under an equal obligation to pay the statutory consideration. I cannot see that they can claim the benefit of the Act unless they implement the corresponding obligations. In this respect it seems to me that the statute is to be construed as an agreement, and the case of the *Great Eastern Company*, 30th November 1880 and 4th April 1881, is in point.

"But the defenders urge that the arrears must be regarded as a mere debt, and that they have made satisfactory arrangements for the payment

of the consideration in future. I cannot say that they have, for the undertaking of the Glasgow and South-Western Railway Company is limited to the time during which they may work the line, and they may cease to do so at any moment. But further, in my opinion the arrears are nothing else than a part of the consideration which is unpaid, and so long as a material part of the consideration remains unpaid, without any offer of or prospect of payment, I am of opinion that the defenders have failed to implement the conditions on which alone they are entitled to use the pursuers' line, and that I must give decree accordingly."

The Girvan Company reclaimed, and argued—This was a statutory enactment in which not merely the two companies but the public were interested. It was intended that the public should have the benefit of these running powers. The interest of the public demanded that the undertaking of the company as a living and going concern should not be interfered with at the instance of creditors—*Gardner v. London, Chatham, and Dover Railway* (per Lord-Justice Cairns); and these running powers were part of the Girvan Company's undertaking. Consequently the Girvan Company were entitled to continue to exercise the powers, provided they paid the rent due for the future, which the agreement with the Glasgow and South-Western Company enabled them to do, and also on payment of the arrears; but for the last the defenders were liable simply as an ordinary debt.

Counsel for the Girvan Company, though not appearing for the judicial factor, stated that the decree as granted against the factor was incompetent, seeing that he had not lodged defences, and the only competent form of decree in such circumstances was a decree in absence.

Argued for the pursuers—Though embodied in an Act of Parliament, there was here nothing more than a private agreement between the two companies. Consequently the Girvan Company were not entitled to take advantage of the agreement unless they implemented the counterpart, which in the present case as regards arrears they did not propose to do. The only interest which the public had in the matter was to avoid a change of carriages at East Challoch, for, of course, the pursuers had a service of trains of their own over this portion of their line.

Authorities—*Attorney-General v. Mid-Kent Railway Company*, Nov. 12, 1867, L.R. (3 Chan. App. 100); *Great Eastern Railway Company v. East London Railway Company*, April 5, 1881, 44 Law Times 903; *Caledonian Railway Company v. North British Railway Company*, July 16, 1880, 7 R. 1147; *Gardner v. London, Chatham, and Dover Railway Company*, Jan. 26, 1867, L.R. 2 Chan. App. 201.

At advising—

LORD PRESIDENT—I have given a full consideration to this case, and am prepared to adhere to the interlocutor of the Lord Ordinary; but I think it desirable, in the interests of all concerned, that the grounds of judgment should be stated a little more fully than is done in the Lord Ordinary's note.

The pursuers' company was incorporated in the year 1857, and when the defenders' company

obtained their Act of Parliament in 1865 the Portpatrick Railway Company was a going concern. The Girvan Company, as it may be called for shortness, was incorporated for the purpose of making a line from Girvan in Ayrshire to East Challoch in Wigtownshire, a place on the line belonging to the pursuers. After the two companies had been in existence for some time, but apparently before the defenders' line had been opened for traffic, a statute was passed in the year 1872, by which the defenders were authorised to run over and use a portion of the Portpatrick line. The section which gives this authority is most important in reference to the determination of the present question. It is in the following terms:—"The company" (that is, the Girvan Company), "and all companies and persons lawfully working or using their railway or any part thereof, may from time to time run over, work, and use with their engines and carriages, waggons and trucks, and with their clerks, officers, agents, carting agents, and other servants, and for the purposes of their traffic of every description, including the reception, handling, booking, invoicing, forwarding, and managing traffic in the same way and to the like extent and effect as if the railways or portions of railway, and works and conveniences after described, were held by the company and the Portpatrick Railway Company jointly for their joint and separate use and benefit on equal terms in every respect;" and then follows a specification of the portions of the Portpatrick line over which these powers are to be exercised. In the next section there is a provision for the consideration which is to be given by the pursuers for this use of the defenders' line. It is provided that "In respect of the joint use hereby conferred upon the company over the Stranraer section. . . The Company shall make payment to the Portpatrick Railway Company as follows:—(1) For the Stranraer section a yearly sum equal to the interest at and after such rate upon the principal sum forming the one-half of the cost of the purchase of lands for and the original construction of the said section, as such rate and cost may be agreed on between the said companies, or failing agreement either as regards such rate of interest or the amount of such cost, as the same may be determined by arbitration in the manner provided under the provisions of 'The Railways Clauses Consolidation (Scotland) Act 1845.'" And then in the same section, but in a subsequent sub-section, it is provided that "(5) The respective yearly sums to be paid as aforesaid shall be paid in two equal portions, on the 11th day of November and the 15th day of May in each year, and the first of each of said payments shall be made at whichever of the said dates shall first happen after the date at which the same shall commence to be payable as aforesaid, the first payment as regards each section being a proportional part of the half-yearly payment corresponding to the period from the date of commencement of such payment to the term-day so first happening thereafter." And it is further provided by the 6th sub-section of the same section that "Subject to the provisions as to maintenance and working expenses hereinafter contained, the foresaid annual payments shall be in full of all claims and demands which the Portpatrick Railway Company can make against the company in respect of the use by them of the

foresaid sections of railway." Then the 6th section of the statute provides—"That from and after the commencement by the company of the user hereby authorised, the company and the Portpatrick Railway Company shall pay in proportion to the use had by them respectively of the foresaid respective portions of railway stations, and works and conveniences in connection therewith, the expense of maintaining the same in substantial repair, and in good working order and condition." And then by the 7th section the Girvan Company are authorised, instead of paying the half-yearly sums for the use of the Portpatrick Company's line, at any time within five years to pay the principal sum themselves, and upon payment the section or sections of the Portpatrick line over which the user is being exercised is to vest in the two companies as joint owners.

The Girvan Railway was opened for traffic on 5th October 1877, and it was worked, not by the Girvan Company themselves, but by the Glasgow and South-Western Company, who have continued to work the line from that date down to the present time. The annual sum which the Girvan Company were bound to pay to the Portpatrick Company under the statutory agreement was not liquidated by the statute itself, and the amount could not be ascertained until the award of an arbitrator had been obtained failing an agreement between the parties. The parties did not agree, and the question was referred to Sir Thomas Bouch as arbitrator, who did not issue his award till July 1880. The amount which the Girvan Company was bound to pay to the Portpatrick Company was fixed by the arbitrator at the sum of £7012 for the whole years from the opening of the Girvan line to the date of the award. This is substantially the sum demanded in the present action in the conclusion for payment, and as far as I can see there is no defence against this demand. There cannot be the smallest doubt that the defenders' company are owing a certain sum as a consideration for the use of portions of the pursuers' line.

But then there is a further conclusion in the summons, which is in these terms—that "the defenders, or anyone claiming right under them, ought and should be interdicted, prohibited, and discharged, by decree foresaid, from using the said Stranraer section and East Pier or works connected therewith, by themselves, their officers or their servants, aye and until the said sums shall have been paid to the pursuers." Now, the only difficulty which occurs to one in dealing with this conclusion of the summons is, that the Statute of 1872, like every enactment of that kind, had in view not merely the rights and interests of the two companies who were before Parliament, but also the interests and benefit of the public. Powers of this kind are given, not merely to promote the interests of a particular railway company, or of two railway companies; regard is always had in these statutes to what is most beneficial to the public who are to use the line; and therefore when this statute gives power to use a portion of the Portpatrick Railway to the Girvan Company and all companies and persons lawfully working and using their railway or any part thereof, there is obviously a certain right given, not merely to the Girvan Company, but also to other parties who may in various ways come to be in their right without actually representing them.

It is therefore necessary in dealing with this conclusion for interdict to take care that we do not rashly prejudice any rights of this kind which may hereafter be brought before us, or which may hereafter be sought to be enforced in any form, in the interests of other parties than the Girvan Company—parties who are not responsible for the Girvan Company, but who may be entitled in their own right to make use of the Portpatrick line. But I rather think that the conclusion of the summons as it stands sufficiently guards against the possibility of prejudicing any rights of this kind. The conclusion is directed against “the defender or anyone claiming right under them,” which means, of course, persons who are responsible for the Girvan line and are subject to the conditions of the Act of 1872, and reading the conclusion for interdict in that light I think that the judgment of the Lord Ordinary is quite sound, but I have thought it necessary to guard against the possibility of its being supposed that this judgment would prejudice the rights of any parties who are not represented here, and who may assert a right to use this portion of the line, so as that they should not be in a position to instruct a good title or otherwise.

With respect to the Glasgow and South-Western Company, I refrain from giving any opinion as to their position, and this decree is not pronounced against them, because although they have intervened to say that they are willing to work this line and pay in future the annual sum stipulated by the Act of Parliament, they are not defenders on record, and therefore the decree of the Lord Ordinary does not directly affect them.

LORD MURE concurred.

LORD SHAND—The Statute of 1872 provides that the defenders, the Girvan and Portpatrick Railway Company, may use a certain portion of the Portpatrick Company's line, and that all companies and persons lawfully working the Girvan Railway may also use that portion of the Portpatrick line, “in the same way and to the like extent and effect as if the railways or portions of railway after described were held by the company (*i.e.*, the Girvan Company) and the Portpatrick Railway Company jointly for their joint and separate use and benefit on equal terms in every respect.” These terms, taken alone, seem at first sight to indicate that there is a part proprietorship in this line in the Girvan and the Portpatrick Companies, but on looking at the history of this line as appearing from other clauses of the statute and from former statutes, it is clear that this is not the nature of the right. The pursuers are the only proprietors of the line, and the sole right given to the defenders and others lawfully working and using their line is a right to use the pursuers' property. The pursuers have been at the cost of making and constructing the line, and they are the parties who have also to bear the cost of maintaining it. The use is given to the defenders on condition that they fulfil the counterpart of that use by paying (1) a certain sum of interest upon the cost of construction, and (2) a proportion of the expense of maintenance. That being so, this seems to me to be substantially a case in which there is a mutual contract, and therefore if one of the parties seeks to get the benefit of stipulations in their favour, they must in return

observe the stipulations by which they are bound.

I therefore agree with the Lord Ordinary that if the Girvan and Portpatrick Company desire to continue the use of the line they must fulfil the counter obligations which the statute imposes on them, and one of these counter obligations is to make the annual payments which are now in arrear to a considerable amount.

I also agree with the Lord Ordinary that it is not a sufficient answer to the pursuers' case to say that the annual payments becoming due from this time will henceforward be paid by the Glasgow and South-Western Company. The pursuers are entitled to say that this is not a proper fulfilment of the obligations under the contract, and that the arrears are substantially in the same position as the rent which is to become due in the future.

The defenders are obviously in a state of hopeless insolvency, and it is pleaded that in the case of a railway company in the position of the defenders the effect of the Lord Ordinary's judgment is to give the pursuers a preference on the estate of the defenders. But I cannot so regard it. So far as the arrears go, the pursuers are in the same position as the other creditors, and they are entitled to no more than a ranking. What the pursuers say is, that if the defenders desire to avail themselves of their privileges under the Act they can do so only on condition of fulfilling the obligations to which they are themselves liable under it. The pursuers are in this advantageous position, that being proprietors of the line they are entitled to say to the defenders, seeking to be allowed to use the line—“You shall not use our property except under the conditions which the contract between us and the statute impose.”

As regards the conclusion for interdict, the pursuers say that from the opening of the line it has not been worked by the Girvan Company, but by the Glasgow and South-Western Company under an agreement with the Girvan Company. In this state of matters I have come to the opinion that the conclusion in which the pursuers ask that the defenders, or anyone claiming a right under them, should be interdicted from using this section of the line, when it is read in the light of this action, cannot receive any other construction than as an interdict which in its terms must apply to the Glasgow and South-Western Company. If they are working the line under an agreement with the Girvan Company, then they are claiming a right under that company in so far as the agreement is concerned. Therefore I think that this action deals with this question, and applies to the Glasgow and South-Western Company.

Whether the Glasgow and South-Western Company can, under the general powers in the Railway Acts, or under any other provision in this statute apart from the working agreement, maintain a right to work the line, is a question on which I give no opinion.

The Lords recalled the interlocutor of the Lord Ordinary, but adhered in substance as regarded the Girvan and Portpatrick Railway Company, but not as regarded the judicial factor thereon, whom they did not decern against, expressly “interdicting, prohibiting, and discharging” the said defenders, or anyone claiming under them, from using the said Stranraer section by themselves,

their officers and servants, aye and until said sums shall be paid to the pursuers.

Counsel for Pursuers—J. P. B. Robertson—Jameson. Agents—Dundas & Wilson, C.S.

Counsel for Defenders (the Girvan and Portpatrick Junction Railway)—D.-F. Kinnear, Q.C.—Murray. Agents—Millar, Robson, & Innes, S.S.C.

Friday, February 3.

FIRST DIVISION.

NOTE FOR LIQUIDATORS OF MOLLISON & COMPANY (LIMITED).

*Process—Company—Adoption of Proceedings in a Voluntary Liquidation under Supervision—Form of Interlocutor.*

A supervision order pronounced by the Court in a voluntary liquidation declared "that any of the proceedings in the said voluntary winding-up may be adopted as the Court may think fit." A note was subsequently presented by the liquidators praying the Lord President "to move the Court to approve of and adopt the whole proceedings in the voluntary winding-up of Mollison & Company before the supervision order." Counsel represented that there was no statutory provision for the adoption of prior proceedings where a voluntary liquidation has been brought under the supervision of the Court, analogous to the provisions of section 146 of the Companies Act 1862 in cases where a voluntary winding-up has been converted into a winding-up by the Court; but that this application was necessary in consequence of the above-quoted clause in the supervision order. He also stated that in the City of Glasgow Bank liquidation the Court "approved of the proceedings" in the liquidation. The Court pronounced this interlocutor—"Approve of the liquidators adopting the proceedings in the voluntary winding-up of Mollison & Company before the supervision order, in terms of the prayer of the said note."

Counsel for Liquidators—Lorimer. Agents—Pringle & Dallas, W.S.

Friday, February 3.

FIRST DIVISION.

[Sheriff of Midlothian.

MAGISTRATES OF LEITH V. GIBB.

*Street—The General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101), sec. 151—Premises abutting on Street—Assessment.*

Held that premises which were divided from a private street partly by the remains of an old gable wall not belonging to the owner of the premises, and partly by a brick wall not belonging to him, but against which

a workshop on his premises was built, did not "abut upon" the street so as to subject their owner to an assessment for the costs incurred by the statutory commissioners in laying down and causewaying the said street in terms of the 151st section of the 1862 Act.

*Process—Expenses—Approval of Auditor's Report.*

An unsuccessful party who had been found liable in expenses tendered the amount of the taxed account of expenses, under deduction of the expense of approval and decree. This offer was refused, and the case enrolled for that order. The Lords (following *Allan v. Allan's Trustees*, 13 D. 1270) found the defender entitled to the amount of the account as taxed, but under deduction of the items incurred for approval and decree.

This action was raised in the Sheriff Court of Midlothian by the Magistrates and Town Council of the burgh of Leith, as commissioners acting under the "General Police and Improvement (Scotland) Act 1862," against John Gibb, factor for Jolly's trustees on certain premises in Leith, for payment of £47, 13s. 2d. as the amount of an assessment alleged to be due by him to the pursuers in respect of said premises.

The said Act provides (sec. 150)—"That where any private street or part of a street is at the adoption of this Act formed or laid out, or shall at any time thereafter be formed or laid out, and is not, together with the footways thereof, sufficiently levelled, paved, or causewayed and flagged to the satisfaction of the commissioners, it shall be lawful for the commissioners to cause any such street or part of a street, and the footways thereof, to be freed from obstruction, and to be properly levelled, paved, or causewayed and flagged and channelled in such way and with such materials as to them shall seem most expedient," &c. The 151st section provides that "The whole of the costs, charges, and expenses incurred by the commissioners in respect of private streets shall be paid and reimbursed to them by the owner of the lands or premises fronting or abutting on said street, in proportion to the extent of their respective premises fronting or abutting on such street, as the same shall be ascertained and fixed by the commissioners or their surveyor."

The premises in question were situated "at or near the lane entering from Leith Walk to Risk's Saw-mill." The pursuers averred that this entrance road or street was a private street within the meaning of the Act, and the assessment which formed the subject of the action was for the defender's proportion of the cost which they had incurred in having the same levelled, paved, and causewayed under their statutory powers.

The defender averred—"The said property does not front or abut on the said lane or street, which was formed by the conterminous proprietors on their own ground for their own individual use, and is divided from the property of the said trustees by a wall which formerly was a part of the gable of certain houses belonging to the conterminous proprietors. The said trustees have no right to use the said road, and have no access thereto, and have no right of property therein, and are not liable for the assessment sued for. The said lane or street is the property of the proprietors of the said saw-mill, and is simply used as an entrance to their property, and for no other purpose."