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."

In his defence he denied that the lane was a private street within the meaning of the Act, but his first plea-in-law was as follows:—"(1) The defender not being the owner of lands or premises fronting or abutting on the private street referred to, is not liable for the costs and charges incurred by the pursuers in respect thereof."

Proof was led, from which it appeared that between the defender's premises and the street in question there were interposed the remains of an old gable wall of a public-house which formerly stood on the ground adjoining the defender's property, and further on a brick wall not the property of the defender, but against which a workshop on his premises was built. On the remains of the old wall Messrs Risk had set up posts and a signboard, apparently without authority from anyone. The burgh surveyor of Leith deponed that in forming the road he had not thought himself entitled to go beyond the old wall, thinking that what was beyond that was private property.

The Sheriff-Substitute (HALLARD) pronounced the following interlocutor:—"Finds in point of fact (1) that the defender's premises abut on the street in question; (2) that said street was flagged and paved as a private street by the pursuers under section 150 of 'The General Police and Improvement (Scotland) Act 1862:' Finds in point of law (1) that said street is a private street in the sense of said enactment; (2) that the defender is liable in the assessment claimed under the statute 1862: Therefore repels the defences, and decerns in terms of the libel," &c.

In his note he stated— . . . "It is thought that this contention on the defender's part is not well founded. The line is a mere boundary line. The interposed property is a mere phantom. The wall line is but an adjunct or pertinent of the street. Where the street ceases along that line the defender's property begins. If he does not choose to open communication with the street, it is because to the advantages of such communication he prefers the exemption he hopes in this manner to obtain from this assessment. He chooses to deprive himself of this communication in the interest of his present plea. He chooses to let Messrs Risk & Company advertise their business along the top of the wall. But that is an option which is not open to him to the effect of evading liability. If to open communication with the street is in him a *res meræ facultatis*, he must pay. Now, there is nothing to show any substantial difficulty in his opening doors and windows in any part of the brick wall to-morrow. It is in one portion of its extent just the fourth wall of his workshop. If so, the workshop and the rest of the property abut upon the street.

"Even were it the case that within the breadth of this dividing wall there is concealed some radical or feudal right vested in someone else than the defender, it seems clear, on obvious principles of equity, that this radical latent owner could not rise up to obstruct the defender's communication with the street without at once incurring the liability to relieve him from the assessment imposed on him by the foregoing judgment. In that way the defender seems quite safe.

"Put the case of a row of houses, one of which is taken down to open a new street running at right angles to the existing thoroughfare. Neither of the adjoining owners have consented to the operation. They find themselves possessed of corner houses against their will. Let the street be prolonged, flagged, and paved under the powers in the statute. Without having been consulted, these owners find their property abutting upon the new street. It is thought clear that they must pay. This is just one of the hardships incident to the extension of towns. Between that case and the present the difference is only in the remains of the old gable, which have been absorbed into the *solum* of the street. The defender's plea is virtually a complaint of hardship against the statute."

The defender appealed to the Sheriff (DAVIDSON) who recalled the Sheriff-Substitute's interlocutor and assoilzied the defender.

The Magistrates of Leith appealed to the Court of Session.

Authority—*Duncan* v. *Cousin and Others*, June 19, 1872, 10 Macph. 824.

At advising—

LORD PRESIDENT—This is an action by the Magistrates and Town Council of Leith, in which they seek to make the defender liable, under The General Police and Improvement (Scotland) Act 1862, for payment of a sum of £47, 13s. 2d. of assessment laid upon him as an owner of premises said to front or abut upon a street which the magistrates say they have recently levelled, paved, and causewayed.

There are two sections of the statute to which reference has been made. The 150th provides—"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 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 first plea-in-law for the defender is in these terms:—"The defender not being the owner of lands or premises fronting or abutting on the private street referred to, is not liable for the costs and charges incurred by the pursuers in respect thereof." Now, looking to that plea, I do not think that the defender can now for the first time be heard to allege that the street in question is not a "private street" within the meaning of the statute, or that the magistrates were not entitled to pave and complete it to their satisfaction. I therefore think that there is no question here under the 150th section.

The only question is, whether the respondent is answerable in any part of the assessment which has been imposed in order to meet the expense of paving or causewaying and flagging