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

the street? The answer to that question depends upon whether he falls under the category of an owner of "lands or premises fronting or abutting on said street." It is quite clear that the premises do not front the street. The matter in dispute is therefore still further limited in its application; and what we have to determine is, whether the premises can be said to abut upon the street in question within the meaning of the statute? Undoubtedly the facts are very peculiar in that respect. The part of the premises which is nearest to Leith Walk is bounded, upon what may perhaps most appropriately be called its north-west side, by the remains of an old wall. It is the wall of a house which formerly stood there upon ground adjoining the respondent's property. The site of the wall, according to the evidence before us, never was within the property of the respondent. It belonged to the person who owned the house of which the wall formed one side. It was not a mutual gable. The house was a separate tenement standing by itself, and had walls of its own exclusively. The site of the wall, therefore, is not the respondent's property. Is it the property of the appellants? Or do they claim right to deal with it either as their property or as a piece of ground which they are entitled to lay out as "part of a street?" In point of fact, it is not laid out, but they have left it alone, and the reason for their so doing is thus given by Mr Beatson, the surveyor for the burgh of Leith:—"In forming the road we did not think ourselves entitled to go beyond the wall A B. We thought that what was beyond that was private property." By that explanation I understand that what remained of the old wall was private property, over which the pursuers were not entitled to extend their street—I mean, to include it within the breadth of the new street which they were making. As regards the property further on, it is bounded by a brick wall, which is not situated upon, but is beyond and outside of the respondent's property. If the brick wall does not belong to the respondent, it must belong to someone else, and the respondent can have no right of access through it to the new street from their house. It is therefore clear that along the whole line from A to B, and down B to C, as delineated upon the plan, the respondent has no access to the new street. The magistrates say that the difficulty which has been raised is a mere shadow of one, because no one has any interest to interfere with the respondent's use of this ground. But I do not suppose that the magistrates will guarantee him against interference from other parties. I am not sure that as police commissioners they would be entitled to give such a guarantee. The party who ought to have been assessed may possibly come forward at some later time and prevent their doing so. As regards the brick wall, I do not see how the respondent could proceed to pull down a wall which is confessedly not his, either in whole or in part.

The question whether the respondent's premises abut or not upon the street, according to the reasonable construction of the statute, cannot be doubtful. He must have access, and an undoubted right of access, to the street in order to abut upon it within the meaning of the statute. The objection is a very narrow one, in more senses than one. It might turn out that no-one would interfere, but that does not entitle us to assume so. On the other hand, it might turn out that the respondent was deprived of that right of access to the street which any property which can be said to abut upon another property possesses.

Lord Deas—I agree with your Lordship that the respondent is barred by the state of his record from maintaining at this stage that this street is not a "private" street within the meaning of the statute.

The only question is, whether the premises sought to be assessed "abut" upon the street? I am of opinion that they do not in any reasonable sense of the words. The site of an old gable is interposed between the street and the respondent's property, which may or may not be a matter of pecuniary importance. Your Lordship will recollect the case of the Boghead and Torbanehill minerals—*Gillespie* v. *Russel*, 17 D. 1; 18 D. 677; 19 D. 897; and 21 D. (H. of L.) 13,—where the mineral was found by the tenant to exist immediately below the surface, in quantities which were altogether unknown to the landlord. For anything that we know, it may be the same case here.

Lord Mure—I agree in thinking that it is now too late for the respondent to raise the question that this street is not "private" within the meaning of the Act. The pleadings are framed upon the supposition that it is a "private" street.

The question remains, whether the premises of the respondent "abut" upon the street? From the first time that I read the Sheriff's note, I felt that if the facts were as there stated, there was no ground for the appeal. There are remains of an old gable between the property of the defender and the street. That being so, there must be interposed between his premises and the street the property of some third party, which is the proper subject of assessment in terms of the statute.

Lord Shand was absent.

The Lords refused the appeal.

On a subsequent day the case was enrolled for approval of the Auditor's report and decree. Counsel for the pursuers, who had been unsuccessful in the appeal, moved the Court to deduct from the account the expenses allowed for the present motion for approval and decree, on the ground that their agent had, both personally at the diet before the Auditor and subsequently by letter, tendered to the defender the amount of the taxed account less the expenses for approval and decree. The defender had refused this tender—*Allan* v. *Allan's Trustees*, July 1, 1851, 13 D. 1270.

Counsel for defender (respondent) submitted that the motion was necessary in order to enable him to extract the decree of Court which had been pronounced in his favour, which he desired and was entitled to do, the question being one of liability to assessment which might be brought up again if the road required repair.

The Lords found the defender entitled to the amount of the taxed account, but under deduction of the expenses of approval and decree, in

respect of the pursuers' tender, and in respect such approval and decree were not necessary to enable the defender to extract the former decree in his favour.

Counsel for Appellants—Pearson. Agent—J. Campbell Irons, S.S.C.

Counsel for Respondent—Mackintosh—Jameson. Agent—George M. Wood, S.S.C.

Saturday, February 4.

FIRST DIVISION.

[Sheriff of Midlothian.

AYTOUN *v.* STODDART.

Triennial Prescription Act (1579, *c.* 83)—*Law-Agent's Account—Fictitious Entries to Elude Application of Statute.*

In an account-current if it shall appear that the final entries are inserted by contrivance so as to exclude the plea of prescription, the Court will sustain that plea. Circumstances which were *held* to negative any contrivance of this kind.

William Aytoun, designing himself writer in Edinburgh, raised this action against Thomas Stoddart, executor of the deceased Mrs Stoddart or Hamilton, widow of Robert Hamilton, for payment of £100, 11s. 8d., being the *cumulo* amount of two sums of £57, 15s. 4d. and £41, 16s. 4d., of which the former was alleged to be the balance due to the pursuer on a business account between him and Mr Hamilton, and the latter to be the balance of a business account between him and Mrs Hamilton. The pursuer alleged that for the amount of the account due by Mr Hamilton, Mrs Hamilton, as his sole executrix and universal legatory, became liable. Mr Hamilton died on 26th May 1875, and the account against him was for the period between July 1865 and May 1875. Mrs Hamilton died on 17th May 1878. The account against her began 31st May 1875, and ended on 16th May 1878. The last two items of it (being the only items after 1st May 1878) were :—"16th May 1878—Attendance with Mr Robert Bruce, and afterwards with Mr Shanks, as to payment of rent of shop now due, £0, 0s. 0d. To postages and incidents, £0, 10s. 0d." This account was rendered in these terms in August 1878 to the defender's agent.

The action was raised on 14th May 1881. With regard to the entries just quoted, the pursuer made this explanation on record—"The last entry in this account relates to business done for Mrs Hamilton, who died on the following day. The pursuer did not enter in his account a charge for that work, although he was engaged more than an hour in her business, and paid a cab hire amounting to 2s. 6d., necessarily incurred in the performance of the said business. This is included in the incidents of 10s. forming the last item of the account."

The defender pleaded, *inter alia*, the triennial prescription.

On 20th July 1881 the Sheriff-Substitute (HALLARD) pronounced this interlocutor and note : — The Sheriff-Substitute having heard parties' procurators on the closed record and productions, Finds that this is an action to recover payment of certain lawyers' accounts alleged to have been incurred to the pursuer, designed therein as 'Writer, Edinburgh:' Finds that the last item of said accounts is dated 16th May 1878, and that the present action was served upon the defender on 14th May 1881 : Finds that the item immediately preceding 16th May 1878 is dated 1st May in said year, and that under said date of 16th May there are two items, to one of which no charge in money is annexed ; while the second is in these terms—'To postages and incidents, 10s:' Finds that said last items are insufficient to bar the application of the Statute 1579, c. 83, to the present action : Finds that said statute applies accordingly : And with this finding appoints the cause to be enrolled for further procedure.

"*Note.*—Only two days stand between the accounts libelled and the immediate and obvious application of the statute. If the two last items, both dated on 16th May 1878, be struck out, the statute applies. In this situation it is thought that an item to which no pecuniary charge is annexed, and an item so vague as 'postages and incidents,' are insufficient to prevent that result. The 2s. 6d. cab-hire mentioned in the record, if it can competently be looked at, gives very doubtful support to the pursuer's plea. But the Sheriff-Substitute thinks that the question must be determined on the account as it stands, and that this is a case for the application of that severity with which a last item of such an account in such circumstances is always scrutinised. An item in so doubtful a position is worthless without clear and definite detail, and has every appearance of having been stated to prevent the application of the statute."

The Sheriff (DAVIDSON) on appeal pronounced this interlocutor :—"*Hoc statu* recals the interlocutor appealed against, and opens the record for the purpose of allowing the pursuer to amend the account libelled, by explaining, on the margin thereof, the particulars of the first item, under date May 16, 1878 ; and also, that the last item under the said date means that the 'postages and incidents' there stated refer to the whole account, and not specifically to the said date."

The pursuer then added to his account this explanatory note :—"It having been agreed between you and me, after my meeting with you on 1st instant, that I should attend you in Portobello on Saturday the 18th instant, to sign the will and sub-lease by you both above mentioned, and that I should arrange with Mr Neilson, the sub-tenant of your premises in Blair Street, that he should pay to the landlord the half-year's rent due yesterday by you of the premises in Blair Street ; and Mr Robert Bruce, your nephew, having called on me to-day to say that you were ill, and that payment of the rent had been applied for—To attendance in a cab at your premises in Blair Street to induce Mr Neilson to pay the said rent in order to avoid legal proceedings at the instance of the landlord. Mr Neilson was out. Thereafter, attendance in the cab on Mr David Shanks, house agent, Hamilton Place, Stockbridge, Edinburgh, the factor of the landlord, to solicit delay in the payment of the rent. Mr Shanks was out; interview with his representative. I requested through him the favour of a call by Mr Shanks in