true position of the question is very clearly explained in the judgment of Lord Herschell in the case of *Schulze* v. *The Magistrates of Galashiels*, 22 R.(H.L.) 70, 33 S.L.R. 94, where the magistrates of that town proposed to apply certain provisions of the Turnpike Act in a manner which one of the inhabitants regarded as harsh and unreasonable; and Lord Herschell says that he can conceive of such clauses being used by corporations very hardly and harshly as regards the owner of property abutting on the streets of the burgh. "This I will say, that it by no means follows in my view that because these provisions become by their incorporation in point of law applicable to all the streets in the burgh, it would be a proper thing for the corporation to treat them as applicable in every case, and to insist in every case upon their applicability by refusing their consent to a building which did not conform to them. But the Legislature has left the matter to the corporation, assuming, no doubt, that it would exercise the powers committed to it reasonably and justly, and not unreasonably or unjustly. If in any particular case (though that is a matter with which your Lordships have not to deal) they should press hardly upon an owner of property abutting on a street in their burgh, that is a matter between the individual and the corporation—a matter for appeal to them as trustees of the public interests and at the same time of the rights of the citizens over whom they are the constituted authority. It is not a matter which this House can consider as any ground for departing from the conclusion to which it would otherwise come upon the construction of an Act of Parliament." And I presume if he had been speaking in the Court below he would have said "that is not a matter which the Court can consider." I therefore come to the conclusion that all we can decide at present is that the Town Council ought to consider it. I agree with Lord Johnston as to the terms of the answer—that a direct answer would mean more than we wish to decide.

LORD KINNEAR—Lord Cullen authorises me to say that he also concurs.

The LORD PRESIDENT and LORD SALVESEN gave no opinion, not having heard the case.

The Court pronounced this interlocutor—

"In answer to the question of law in this case, find that the appellants are not entitled to refuse their sanction to the formation of the street *de plano* and without consideration of the particular circumstances of the case, but are bound to consider the petition of new in terms of the remit contained in the interlocutor of the Sheriff-Substitute dated 18th October 1909, and decern."

Counsel for Appellants — Macmillan. Agents — Adamson, Gulland, & Stuart, S.S.C.

Counsel for Respondents — Blackburn, K.C. — Maconochie. Agents — Dundas & Wilson, C.S.

Thursday, June 16.

FIRST DIVISION.

[Lord Cullen, Ordinary.

TODD (LIQUIDATOR OF MILLEN & SOMMERVILLE, LIMITED) *v.* MILLEN AND OTHERS.

Company — Members and their Liability — Winding-up — Contributories — Agreement—Bar—Prospectus—Statement that Vendors "have Agreed to Subscribe for" Shares.

The prospectus of a company, signed by the vendors and issued to the public, stated that the vendors "have agreed to subscribe for the balance of £500 of the ordinary shares." *Held* (*diss.* Lord Salvesen) that the prospectus did not amount to proof of a concluded contract, binding on the company to allot, or the vendors to accept, the shares, and that the vendors, on a winding-up, were not liable, either on the ground of agreement or personal bar, to be placed on the list of contributories.

On 4th February 1910 Alfred A. Todd, C.A., Glasgow, liquidator of Millen & Sommerville, Limited, engineers and contractors, Glasgow, presented a note to the Court, under the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), and particularly sections 32 and 163 thereof, for authority, *inter alia*, (*b*) to rectify the register of shareholders by placing thereon the names of certain persons who, as stated in the prospectus, "had agreed to subscribe" for shares.

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (CULLEN), who on 19th March 1910 refused the prayer of the note.

Opinion.—"By the note No. 12 of process the liquidator, *inter alia*, seeks to rectify the register of shareholders by placing thereon the names of Alexander Millen, Robert Galbraith Sommerville, and Alexander Melville, as trustees for their firm of James A. Millen & Sommerville, as holders of 480 ordinary shares of the company.

"James A. Millen & Sommerville was the firm whose business the company was formed to and did acquire under an agreement dated 20th and 21st May 1907. The three persons above named were the partners of it. Neither they nor their said firm ever applied for the 480 ordinary shares in question. The liquidator does not allege a contract to take the shares otherwise than by tabling a prospectus, dated 22nd June 1907, issued by the company for the purpose of offering its preference shares to the public. A copy of this prospectus was, in accordance with

the requirements of the Companies Acts, signed by the directors, who included the said Alexander Millen, Robert Galbraith Sommerville, and Alexander Melville.

"The prospectus contains the following passage:—'The price to be paid by the company for the said works, business, and other assets of James A. Millen & Sommerville is £10,000, of which £5000 represents the value of the goodwill of the business, and said price is to be satisfied by the allotment to the partners of said firm of 10,000 ordinary shares of the company, all fully paid in the following proportions, viz.—4500 shares to the said James Alexander Millen, 4500 shares to the said Robert Galbraith Sommerville, and 1000 shares to the said Alexander Melville. The price to be paid for the tenancy of the said lease of the ground at Cardonald with the buildings and others thereon is £2000, and is to be satisfied by the allotment to Archibald Russell, iron merchant, 41 King Street, Glasgow, one of the partners of the said Millen, Russell, & Co., of 2000 ordinary shares of the company, all fully paid. Messrs James A. Millen & Sommerville have agreed to subscribe for the balance of £500 of the ordinary shares, and the present issue of preference shares will be utilised to provide the necessary capital to equip the works and to provide additional working capital.'

"The statement as to the 500 shares in the passage above quoted is founded on by the liquidator as proving a concluded mutual contract between the firm of James A. Millen & Sommerville and the company, whereby the former contracted to take, and the company contracted to give them, the 500 ordinary shares.

"The respondents aver as follows:—'Neither the respondents nor their former firm of James A. Millen & Sommerville ever entered into any agreement with the company to subscribe for the balance of 500 ordinary shares of the company referred to in the said prospectus, nor did they ever apply or subscribe for these shares or any of them. The directors of the company neither when originally allotting the shares of the company nor at any other time subsequently called upon the respondents or their said firm to subscribe for the said 500 shares, and neither the respondents nor their said firm were under any obligation to do so. The statement in the said prospectus that the respondents' said firm had agreed to subscribe for the said 500 shares was erroneous, and no such agreement was ever concluded.'

"The respondents founded on the case of *in re Moore Brothers & Company, Ltd.* (L.R. [1899], 1 Ch. 627), and a relative passage in Lindley on Companies (6th ed., vol. i., p. 22), to the effect that 'a statement in the prospectus that certain persons will take certain shares in the company is not sufficient evidence of an agreement between them and the company so as to bind them to take such shares, even though the persons referred to are directors of the company and the prospectus is issued by them after the company has come into existence.'

"In the case of *in re Moore* there were certain elements in the statement in the prospectus which made it too indefinite as a statement of contract, but the Court enunciated the broader view that a statement in a prospectus that some one, a party to the issue of the prospectus, has intimated an intention or a willingness to take shares does not sufficiently evidence a concluded agreement between that party and the company, binding both.

"I am unable to distinguish this case from that of *in re Moore*. The words there used were 'will take.' The words here are 'have agreed to subscribe for.' In both cases the words used are unilateral in their significance. Counsel for the liquidator conceded that the prospectus, in order to support his case, must evidence a concluded mutual contract binding the respondents to take, and the company to give, the shares. I do not think that the prospectus evidences such a concluded contract, and I am accordingly of opinion that head (*b*) of the prayer of the note falls to be refused."

The liquidator reclaimed, and argued—The respondents were bound to take the shares, for they had signed the prospectus containing the statement in question, and that was sufficient evidence of a concluded contract between them and the company. They "had agreed" to become members, and that was sufficient—Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69), sec. 24 (2). Moreover, having signed the prospectus they were barred from repudiating the ordinary inference from the words used. The case of *Moore* [1899], 1 Ch. 627, was distinguishable, for the words used there were a mere representation of a future intention. The present case was governed by that of *Moore and De La Torre* (1874), L.R. 18 Eq. 661.

Argued for respondents—The prospectus was a document prepared for the public, and could not create a binding agreement where, as here, there was no agreement in fact. "Have agreed to subscribe" meant "have offered to subscribe." That being so, the prospectus was not evidence of a concluded contract to take the shares in question.

At advising—

LORD PRESIDENT—The question in this reclaiming note is whether certain gentlemen ought to be put upon the list of contributories of Millen & Sommerville, Ltd., which is a company in liquidation, and the matter turns entirely on a passage contained in the prospectus of the company. The company was formed to acquire a business which had been a private business, and it was formed in a way very common, namely, by the vendors of the business, the old partners, taking payment in shares. There was a prospectus issued, the object of which was to invite subscriptions for preference shares, and that prospectus contained the following passage—"The price to be paid by the company for the said

works, business, and other assets of James A. Millen & Sommerville is" so and so, and "said price is to be satisfied by the allotment to the partners of said firm of 10,000 shares all fully paid" in certain proportions. "The price to be paid for the tenancy of" the ground "is £2000, and is to be satisfied by the allotment to" a certain gentleman "of 2000 ordinary shares of the company all fully paid." If all those shares are summed up they account for the whole of the ordinary shares of the company except 500. The prospectus goes on—"Messrs James A. Millen & Sommerville have agreed to subscribe for the balance of 500 of the ordinary shares, and the present issue of preference shares will be utilised to provide the necessary capital to equip the works and provide additional working capital."

As a matter of fact none of those 500 ordinary shares were ever allotted to Millen & Sommerville, and twenty of them were issued to other parties. Matters stood in that position until the liquidation of the company, and the sole question at present is whether the liquidator of the company is entitled to put the partners of Millen & Sommerville, as trustees for the firm, on the list of contributories in respect of 480 shares.

I agree with the view taken by the Lord Ordinary. I think that this case is really practically the same as *in re Moore Brothers & Company, Ltd.* ([1899] 1 Ch. 627), and I agree with the decision in that case. The criterion must be whether in the prospectus you can find a concluded agreement which at the time would have been enforcible by either party against the other, because it is not said that there is any other agreement which can be proved except that which can be found in the prospectus. There is also, I think, no room for the doctrine of bar, because the question is really between the company, represented by the liquidator, and these partners. It is not a question raised by anyone who has taken preference shares upon the faith of the statement made in the prospectus. The matter therefore comes to be as narrow as this—is that sentence "Messrs James A. Millen & Sommerville have agreed to subscribe for the balance of 500 of the ordinary shares" a contract which could have been enforced either by Millen & Sommerville against the company or by the company against Millen & Sommerville? Now I do not think that it is, because the statement is unilateral in its expression, and it does not seem to me in any way to bind the company to accede to the proposition which Millen & Sommerville make in regard to subscribing for these shares. I think there is nothing more in the case than that, and I refer to the opinion of the English judges in the case of *in re Moore* which I have already cited. Upon the whole matter I am of opinion that the Lord Ordinary's opinion should be adhered to.

LORD KINNEAR—I have come to the same conclusion, but I must say not without very considerable difficulty. My difficulty arises on the construction of the words used in the prospectus. It is true that there is nothing to establish an agreement enforcible at law except the statement in the prospectus, and the question as to the effect of that statement is really what meaning would the words convey to the persons to whom it was addressed as to the intention of the persons making the statement? Where it is said that parties "have agreed" to take shares, then I think that, if language is used with any precision, that statement does not mean that they are willing to take, but that they have made an agreement with somebody else under which they are to take shares. An agreement is well defined by Sir Frederick Pollock as "an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them." The necessary implication of the word seems to be the interchange of consent between two parties. And therefore I have some difficulty in holding with the Lord Ordinary and with your Lordship that in the proper sense of the words the language used in this prospectus is unilateral. The words are in the mouth of a company, and are to the effect that Messrs Millen & Sommerville have agreed to do so and so. But then I think in the ordinary use even of words of common language in matters of business and in the prospectuses of business companies a considerable latitude must be allowed, and that we are not to ascribe to the framers of such documents so exact a precision in the use of language as to bind them to anything which we are not satisfied they really meant. In ordinary language I think the words that persons have agreed to do so and so are often used only as meaning that the persons are willing to do so and so, and I am disposed to think that any intending shareholder reading this prospectus would not have considered that the words meant that there was a completed contract to take shares between the persons named and the company, but that he was invited to have confidence in the prospectus because these persons were willing to take the number of shares specified. If that is the proper construction, then I think the most that can be said about it is that the language of the prospectus is ambiguous, and, there being nothing else to fix the directors with liability, I agree with your Lordship that the statement in the prospectus does not import a completed contract enforcible in law by which these gentlemen were bound to take these shares. In all the rest of your Lordship's opinion I entirely agree.

LORD JOHNSTON—[*Read by the Lord President*]—I think that the Lord Ordinary has arrived at a sound conclusion.

That a person should become a contributory he must (Act of 1908, section 123) be a member of the company. That a person should be a member of the company

he must (section 24) have agreed to become one, and such agreement is a mutual, not a unilateral agreement.

I assume that the company was registered prior to the issue of the prospectus, and that the prospectus was issued with a view to solicit applications for its preference shares. It sets forth the way in which the 12,500 £1 ordinary shares of the company were intended to be disposed of. 12,000 were to be allotted to the vendors as fully paid in satisfaction of the price of the business to be acquired, and then it is added, "Messrs James A. Millen & Sommerville have agreed to subscribe for the balance of 500 of the ordinary shares."

This is certainly a representation for which the three partners of the firm of James A. Millen & Sommerville, who were all parties to the issue of the prospectus, are responsible. As was said by Lindley, M.R., in the case of *Moore Brothers & Company, Limited*, [1899] 1 Ch. at 634—"If we had to consider the effect of the prospectus with regard to a complaint made by a person who had taken shares in the company on the faith of these statements we might possibly come to a conclusion advantageous to the person. But we have not had to consider anything of that kind. We have to consider whether these statements in the prospectus amount to satisfactory proof not merely whether the document is admissible in proof, but whether it is satisfactory proof of an agreement" between the firm and the company that the firm should take and that the company should give them 500 £1 shares.

It must be admitted that the case is not so clear as that of *Moore Brothers & Company, Limited*, for there is no indefiniteness about the number of shares, and there is no question about the proportion in which they were to be subscribed for by individuals. But notwithstanding, I cannot find in this statement in the prospectus satisfactory proof of that mutual agreement to take and to give which is necessary under the statute to render the firm a member and therefore a contributory. The prospectus is not a constituent document of the company from which and subsequent actings of parties, as in *Isaac's* case ([1892] 2 Ch. 158) an agreement may be inferred.

At best the prospectus is a representation which the partners of Messrs James A. Millen & Sommerville may be barred from denying, that in name of their firm they will apply for and take when allotted 500 shares in the company, but that is far short of proof of a concluded agreement between their firm and the company which would *de plano* have entitled the firm to compel registration, or have warranted their being placed on the register by the act of the directors. If so, they cannot be made contributories.

LORD SALVESEN—The sole question in this case relates to the proper construction to be put on a statement in the prospectus issued by the limited company now in liquidation. That statement is in the following terms:—"Messrs James A. Millen & Sommerville have agreed to subscribe for the balance of £500 of the ordinary shares, and the present issue of preference shares will be utilised to provide the necessary capital to equip the works and to provide additional working capital." The Lord Ordinary, following the decision *in re Moore*, [1899] 1 Ch. 627 has held that the words "have agreed to subscribe for" are unilateral in their signification and do not evidence a concluded mutual contract binding the respondents to take and the company to give the shares.

If I could adopt the Lord Ordinary's construction I should have reached the same conclusion as he and your Lordships have done, but in my opinion the words already quoted are not mere evidence of an intention on the part of the firm of James A. Millen & Sommerville to take shares if the company of which the partners were directors desired them to do so. The prospectus was issued by the company, and was signed by each of the persons who were partners of the firm in question, and who were also directors of the company. It was therefore a joint statement by the company and the individual respondents that an agreement had been come to that they should subscribe for £500 of the ordinary shares. The object of the prospectus was to obtain preference capital, and I do not doubt it would be a security to the preference shareholders that all the ordinary share capital had been arranged to be taken up. I think it was plainly implied in the language used that the company had agreed to allot the £500 of the ordinary shares which the respondents had agreed to subscribe for. No person reading the prospectus and believing it to be an honest document could take any other meaning out of it, and I am quite satisfied the framers of the prospectus had this fully in view. It would never occur to an ordinary reader that it was left in the option of the directors to avail themselves or not as they chose of the obligation that the respondents were stated to have come under to subscribe for the shares; and that they could, whenever the preference capital had been secured, have simply declined to allot the shares at all. If that view were taken, it is obvious that no remedy would be open to the preference shareholders who had subscribed on the faith of the prospectus, for there would be no misrepresentation if the respondents had in fact come under an obligation to subscribe for the shares at the date when the prospectus was issued; although the directors, of whom they constituted one half, immediately thereafter resolved that they were not to be held to their obligation. The case appears to me in this respect to be distinguishable from *in re Moore*, for Vaughan-Williams, L.J., stated that it was not even suggested in the course of the argument that the prospectus in that case meant "that the company were bound to allot shares to the directors, and that the directors were bound to accept them." There were, besides, as the Lord Ordinary has

pointed out, certain elements in the statement in the prospectus in *Moore's* case which made it too indefinite as a statement of contract; and I cannot doubt that this fact largely influenced the ultimate judgment. I hesitate to accept the view that a statement in a prospectus that someone who is a party to its issue has intimated an intention to take shares does not sufficiently evidence a concluded agreement between that party and the company binding both; but it is sufficient to say that the language used in the present case is not language of intention but of concluded agreement; and it would be entirely contrary to the good faith of the contract under which the preference shareholders agreed to take shares in the company to hold that the respondents were not bound to take any shares in the concern on the technical ground that the company had not formally come under obligation to allot such shares.

I do not think any difficulty is caused by the fact that twenty of these shares were allotted to persons other than the respondents, as they were directors of the company and must have known of the allotment of these shares, and they and the company must be held to have acquiesced in the agreement being modified to that extent. If the whole £500 had been alloted to third parties and fully paid up, no person would have had an interest to enforce the agreement; but to the extent to which they have not been allotted the liquidator has a duty to see that the assets are increased by the respondents being put upon the register as shareholders. It was not contended that if the prospectus be construed as I have held it must be there was any other ground on which the respondents could resist the liquidator's demand, and this being so, I am of opinion that the Lord Ordinary's interlocutor should be recalled, and that we ought to remit the petition to him with instructions to grant head (*b*) of the prayer.

The Court adhered.

Counsel for Petitioner (Reclaimer)—Sandeman, K.C.—Hon. W. Watson. Agents—Watt & Williamson, S.S.C.

Counsel for Respondents—Macmillan—Gentles. Agents—Ronald & Ritchie, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, June 18.

(Before Lord Low, Lord Ardwall, and Lord Dundas.)

WRIGHT *v.* DUMBARTONSHIRE PROCURATOR-FISCAL.

Justiciary Cases—Suspension—Evidence—Motor Car—Exceeding Speed Limit—Ascertainment of Speed—Police "Trap"—Motor Car Act 1903 (3 *Edw. VII, c.* 36), *sec.* 9.

The Motor Car Act 1903 (3 Edw. VII, c. 36), sec. 9, enacts—". . . A person shall not under any circumstances drive a motor car on a public highway at a speed exceeding twenty miles per hour. . . ."

A person was charged with exceeding the speed limit by driving a motor car at 25 miles an hour. The *locus* of the alleged offence was within a "trap" consisting of a quarter of a mile of straight road. The accused was convicted on the evidence of two police constables, who had stood together 470 yards from the entrance to the "trap," and had taken the time when they judged that the car entered and when it left the "trap."

Held, in a suspension, that in view of the fact that the alleged speed of the car was only five miles in excess of the statutory limit, the evidence on which the conviction followed was not sufficiently reliable to justify the conclusion arrived at by the Sheriff-Substitute, and the conviction *quashed*.

Observations (*per* Lords Low, Ardwall, and Dundas) on the method adopted for ascertaining the speed of the motor car.

John Graham Wright, shipowner, Dunard House, Row, was charged in the Sheriff Court at Dumbarton on 29th September 1909 at the instance of Robert P. Mitchell, Procurator-Fiscal for Dumbartonshire, on a summary complaint which stated—"You are charged at the instance of the complainer that on 6th September 1909, on the public highway called or known as West Clyde Street, Helensburgh, in said county, and in particular at the part thereof between Ferniegair Lodge and Ardmore House, you did drive a motor car at a speed exceeding twenty miles per hour, contrary to the Motor Car Act 1903, section 9, and such offence is a first offence, whereby you are liable to a penalty. . . ."

The accused having been found guilty by the Sheriff-Substitute (BLAIR) and sentenced brought a bill of suspension in which he, *inter alia*, stated—"(4) The only evidence for the prosecution before the Sheriff was that of two constables. Their evidence was to the effect that the trap was a quarter of a mile in length, extending in a straight line from east to west from Ferniegair Lodge to Ardmore House and that they were standing more