at five o'clock it was possible to look down that straight road and see persons for 150 yards distant. But that was not proving that there was not a proper look-out kept, and for the very good reason that none of them knew that the poor little child was in the road when this car was approaching. Indeed the strong probability upon the evidence is that she was not, but that she was in behind the tar boiler or the lumps of pitch, and a little mite like that does not need very much to prevent her being seen.

The second ground is that no proper warning by bell or gong was given. But it is no part of the duty of a driver to keep ringing his gong. He has got to ring the gong when he sees some obstruction or person to be moved out of the way. But if there was no evidence, as there was none here, that there was any person in the way, there was no wrong in the driver not having sounded his gong.

Then it was said that the speed was excessive. On that we have no evidence. The only speed spoken to was, in epithets, that the car was going a pretty good rate, and, in figures, 12 to 15 miles an hour. Neither of these speeds was *per se* excessive, and more than that, the people who said so all agreed that at the time of the accident nobody even suggested that the speed was excessive.

Therefore upon all the three points I find that there has been no evidence led whatsoever, and I think it is my duty to withdraw the case from the jury. As regards the dictum of Lord Young that was quoted by counsel, I have no hesitation in saying that that was not law, and I am not bound by it. If the learned counsel thinks that Lord Young's opinion was right he can take exception to the course now being followed and see what fate it will have before another tribunal. I will therefore direct the jury to return a verdict for the defenders.

The jury returned a formal verdict for the defenders.

Counsel for the Pursuers—Crabb Watt, K.C.—Jameson. Agents—Marr & Sutherland, S.S.C.

Counsel fer the Defenders — Hunter, K.C.—Munro. Agents—Patrick & James, S.S.C.

Tuesday, June 14.

FIRST DIVISION.

[Sheriff of Fife.

KIRKCALDY MAGISTRATES *v.* EARL OF ROSSLYN'S TRUSTEES.

Burgh—Street—Petition for Warrant to Lay out Street—Conditions—Avoidance of Cul-de-Sac—Right of Town Council to Refuse Petition de plano—Burgh Police (Scotland) Act 1903 (3 *Edw. VII, cap.* 33), *sec.* 12.

The Burgh Police (Scotland) Act 1903 enacts—section 12—"Any person presenting a petition to the town council for warrant to form or lay out any new street shall fulfil any conditions which the town council may, by the warrant granting the petition, impose with regard to the following matters, viz. (1) the avoidance of a cul-de-sac. . . ."

Owners of ground within burgh applied to the town council in terms of section 11 of the Burgh Police (Scotland) Act 1903 for authority to lay out a new street. The street as shown on the plans ended in a cul-de-sac owing to its having been carried up to the extreme limit of the petitioners' property.

Held that the town council were not entitled to refuse the application *de plano*, their power under section 12 of the Act being only to impose conditions.

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), section 12, is quoted *supra in rubric.*

On 8th April 1909, R. C. De Grey Vyner, of Fairfield, Yorks, and others, trustees of the Right Hon. the Earl of Rosslyn, presented an application to the Town Council of Kirkcaldy, in terms of section 11 of the Burgh Police (Scotland) Act 1903, for authority to lay out a new street on part of their property within the burgh. The Town Council having declined to sanction the proposed street, on the ground that, as shown on the plans, it ended in a cul-de-sac, the petitioners appealed, under section 339 of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict., cap. 55), to the Sheriff-Substitute (SHENNAN), who on 18th October 1909 pronounced this interlocutor:—"Sustains the appeal: Finds that the respondents were not warranted in refusing to sanction the street referred to in the appeal merely on the ground that it would form a cul-de-sac: With this finding remits to the respondents to consider of new the petition of the appellants," &c.

The Town Council appealed to the Sheriff (MACFARLANE), who on 9th December 1909 adhered.

Note.—"The Town Council maintained that section 12 is to be read as giving them a power to impose on a petitioner a condition that the proposed street shall not terminate in a cul-de-sac, under certification that if the petitioner does not

or cannot comply with the condition the petition will be refused; and they plead—In respect that the proposed street would constitute a cul-de-sac, the defenders are entitled to refuse their sanction thereto under section 12 of the Burgh Police (Scotland) Act 1903.

"It was not disputed that the pursuers are unable to lay out the new street in such a way as to prevent it ending in a cul-de-sac. They have carried it up to the extreme limit of their own property.

"I agree with the Sheriff-Substitute, for the reasons stated by him, that section 12 does not confer on a town council the right of refusal claimed by the defenders. Section 11 deals with the circumstances in which a town council may refuse a petition. Section 12 provides for the case of a town council granting, not refusing, a petition. No doubt the granting may be subject to conditions, but to impose a condition with which the petitioner cannot possibly comply is just to refuse the petition. I think such an indirect result is contrary to the intention of the section, which, as I read it, authorises the imposition of such conditions only as the petitioner can comply with, leaving the town council, in the event of his failure to do so, to the remedies provided, *e.g.*, by section 41."

A case for appeal was stated.

The *question of law* was—"Were the appellants entitled, under the powers conferred on them by the Burgh Police (Scotland) Act 1903, and in particular section 12, to refuse their sanction to the formation of said street as proposed by the respondents on the ground that it would form a cul-de-sac."

Argued for appellants—The Magistrates had power to refuse the application where as here the street would end in a cul-de-sac —*Stevenson* v. *Lee*, 1910 S.C. 14, 47 S.L.R. 11. It was not for the appellants to suggest how the cul-de-sac was to be avoided. That was for the owner of the ground to do in submitting his plans for approval.

Argued for respondents—The Town Council were not entitled to refuse the petition *de plano*. Their duty was to impose such conditions as would avoid the cul-de-sac. The case of *Stevenson* (*cit. sup.*) was not in point, for it depended on a private Act of very special terms.

At advising—

LORD JOHNSTON—The Earl of Rosslyn's trustees are proprietors of an area of ground in the burgh of Kirkcaldy, bounded on the south by the line of the North British Railway Company and on the north by Loughborough Road, which they propose to lay out for feuing. They have already obtained a warrant from the Town Council to construct a street intersecting this piece of ground from north to south, running from Loughborough Road on the north to the railway line on the south, where it ends in a cul-de-sac, as there is no level-crossing, and at present, at least, no bridge. They propose to develop their ground by taking a street eastward from this new street as far as their eastern boundary. But as they have no control of the adjoining land, though they may take it to their own boundary, it must at present end in another cul-de-sac, and must continue to do so unless Miss Keddie the adjoining proprietor to the east opens her ground for feuing and continues their street through her ground. For this proposed new street the Rosslyn trustees have applied for a warrant in terms of the 11th section of the Burgh Police Act 1903. The Town Council have refused the warrant *de plano*, and they give as their reason simply that the proposed street would constitute a cul-de-sac.

The Rosslyn trustees appealed to the Sheriff-Substitute, who found "that the Town Council were not warranted in refusing to sanction the street referred to in the appeal merely on the ground that it would form a cul-de-sac," and with this finding remitted to the Town Council to consider of new the application of the Rosslyn trustees. The Sheriff refused an appeal taken to him, and was thereon asked to state a case, which he did, appending the following question—[*His Lordship read the question, supra*].

I think that the judgment of the learned Sheriff-Substitute is sound, and that the Sheriff properly refused the appeal.

Subject to the law of nuisance, a proprietor is at common law entitled to put his property to any use he pleases, but in towns he is subjected by statute to a number of regulations interfering with his freedom of action for what is, at any rate intended to be, the general good; *inter alia*, when he proposes to lay out his ground for building purposes, and requires to form or lay out any new street, he must now, under the Burgh Police Act 1903, as a preliminary, obtain the sanction of the Town Council to his doing so. This is precedent to going to the Dean of Guild Court for a lining for his actual buildings. And with his application he must lodge plans showing dimensions, levels, provision for drainage, and other particulars.

If it appears that the proposed street in any of its details (*a*) does not fulfil the conditions required by the Burgh Police Acts, or (*b*) is otherwise contrary to law or (*c*) to private rights, the Town Council may either refuse the application or may grant the same subject to such modification of the plans or other lawful conditions as may be necessary in the circumstances.

In the first case it is clear that modification of plans or conditions can only be such as may conduce to the provisions of the Burgh Police Acts being complied with. In the second case, having regard to the common law freedom of the individual proprietor, it is difficult to determine what sort of contravention is struck at, and therefore what sort of modification or conditions could be proposed with a view to obviating it. And in the third case, as infringement of private right is contemplated, it is clear that the condition must be such as will obviate such infringement. Now it is no breach of any condition of the Police Acts, it is not otherwise contrary to

law, and it is no infringement of private right to form a street which will end in a cul-de-sac, and therefore under this section the Town Council has no power to refuse a warrant on that ground, nor to impose any condition on the granting, for such condition would not be lawful.

But the next section (section 12) provides further that any person craving warrant to lay out a new street "shall fulfil any conditions which the Town Council may by the warrant granting the petition impose with regard to the following matters, viz., (1) the avoidance of a cul-de-sac."

That a street should end in a cul-de-sac is not illegal; it may be undesirable, the degree of undesirability being one of circumstances, and it may be possible to obviate its undesirable characteristics, and to that end the town council may impose conditions. But they are not empowered in order to avoid a cul-de-sac to refuse their warrant *de plano*.

There are four other matters under section 12 with regard to which conditions may be imposed.

From the nature of these matters all such conditions must be positive, something to be done. None of these matters admits of refusal, but only of conditional granting of the petition, and equally so it is clear with reference to the one in question. What the nature of a condition which will effect the avoidance of a cul-de-sac may be, it is not for us at present to determine, nor can we at present determine whether the imposition of a condition impossible of performance, rendering therefore the conditional granting of the warrant a virtual refusal, could be sustained. While, therefore, the learned Sheriff acted, I think, rightly in refusing the appeal, in the note to his interlocutor he has gone beyond the matter which he was called on to decide. He may be right in the conclusion which he has expressed. The question on which he has touched may yet arise, but it is not before the Court in the present case.

All that under this stated case we can determine is the point of law, viz., that the mere fact that the street, as laid out on the plans presented to the Town Council, results in a cul-de-sac does not warrant the refusal *de plano* of the petition. I do not, however, think that the question put quite meets the situation, or that to answer it with a simple negative would quite express the judgment of the Court. It can only be answered under qualification.

LORD KINNEAR — I agree with Lord Johnston, and my only difficulty in considering the case has arisen from the point to which Lord Johnston adverted, that if the question proposed by the Sheriff is read with reference to his opinion, an answer in the negative would appear to decide a question which I think is not before us at present, and which it may or may not lie within our jurisdiction to decide if ever it arises. I think that the Town Council has been too hasty, and upon that ground I agree that the interlocutor of the Sheriff-Substitute remitting to them to reconsider the question is right.

The statute confers upon them a very wide discretion, but then it is conferred in terms which to my mind make it clear that they are to consider, in the exercise of that discretion in each case which comes before them, the particular conditions of the case presented, and to impose such conditions of their own according to their judgment of the necessities of the particular case. The statute requires that when a person craves warrant for laying out a new street he shall fulfil any conditions which the town council may by warrant granting leave impose with regard to certain matters including the avoidance of a cul-de-sac. I think, upon the case presented to us, the Town Council claims to convert that discretionary power into an absolute power to refuse peremptorily in any circumstances to allow a street of the kind called a cul-de-sac to be made. I think that is not their power. I think they must, in the due exercise of their discretion, consider the circumstances of each case with reference to the necessities of the community on the one hand and to the reasonable rights of the petitioner on the other; both must be kept in view, and it is only after full consideration of the whole circumstances that they are to grant warrant without conditions or to impose such conditions as they think fit. I do not think it is open to us to decide whether they would be within their power to impose such conditions as the petitioner could not in the exercise of his own proprietory rights fulfil, and so, in effect, to prohibit absolutely the construction of the street. I think that position of things raises two different questions—in the first place, the question for the discretion of the magistrates. It may be, in certain circumstances, perfectly reasonable to say that a street cannot be sanctioned because it would be a cul-de-sac; on the other hand, it might be harsh and very oppressive to prohibit a street altogether because in particular circumstances it cannot be carried through a neighbouring property. These are questions of circumstances which primarily at least it is for the Magistrates to decide. I do not think that this Court would have any power to review their decision as a question of discretion, and therefore the condition on which their assent or refusal for warrant in these circumstances can be brought before us is that they have gone beyond the reasonable exercise of the discretionary power given to them. I do not think we are in a position at present to anticipate what decision on the question of discretion should be given.

It would therefore be premature to decide whether the exercise of that power one way or another would be within the Act? All that I think we ought to decide is that the Magistrates ought not to have refused the petition *de plano* without considering whether in the exercise of a reasonable discretion it might or might not be granted. I think the

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