Thomas Paterson should supply the necessary capital in equal proportions, either by holding bank stock in name of the partners, or by advancing the requisite funds. Now, it was for the purpose of carrying out this arrangement that this stock was bought, and it is not immaterial to observe that the stock was bought before the contract was signed, but with a special view to the arrangements contained in it, which leaves no room for any question as to how far the terms of the transfer and registration were verbally or substantially consistent with these provisions in the contract—the one being for the very purpose of fulfilling the other. I think that they must be taken in the view of the petitioners to mean one and the same thing—namely, that Mr Gillespie and Mr Paterson in taking the stock were fulfilling the obligation which they were about to undertake in the contract of partnership of holding bank stock in name of the firm. Therefore it is proved by going back to this partnership arrangement that Mr Gillespie and Mr Paterson are not the sole partners in the firm, but that there is a third partner, the son; and therefore that these two gentlemen who are registered as shareholders are not trustees for themselves only, or trustees for a firm of which they are sole partners, but trustees for a firm in which there were three partners. This makes the trust character all the more distinct. Taking that fact even as it stands disclosed on the face of the register and the transfer, or taking it by going back to the partnership arrangement, the result is the same—these gentlemen hold the stock as joint-owners in a fiduciary capacity. The result of this is, in the first place, that the survivor will be sole owner of the shares, and, in the second place, that they are liable jointly and severally in the obligations of partners in respect of the stock so held.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court directed the liquidators to remove from the list of contributories the name of the partnership firm of Gillespie & Paterson, and *quoad ultra* refused the petition.

Counsel for Petitioners — Lord Advocate—Mackintosh—Darling. Agents—Mackenzie & Kermack, W.S.

Counsel for Liquidators—Kinnear—Balfour—Asher—Graham Murray. Agents—Davidson & Syme, W.S.

Wednesday, March 19.*

SECOND DIVISION.

BLACK *v.* CORNELIUS.

Agreements and Contracts—Locatio operis—*Liability where Architect of Works employs a Surveyor to Measure.*

An architect of works consulted in the general way, with a view to the erection of buildings and an ascertainment of their probable cost, has authority to engage a surveyor to do the measuring and prepare the schedules, for the cost of which, if the work does not go on, the architect's employer will be liable.

* Decided January 24, 1879.

William Cornelius, a house painter in Edinburgh, being about to erect certain shops and dwelling-houses in May or June 1877, got a specification of the work to be executed from Mr Deas, architect, Edinburgh. Mr Deas received and accepted estimates for the work which Cornelius had empowered him to do. Mr Deas then employed Mr Edward Black, an ordained surveyor, to measure the works connected with the erection of the buildings, which he did from plans furnished to him. He also prepared the schedules of the work, and these measurements and schedules were used by Cornelius in obtaining estimates, and were issued by him to the different contractors, and formed the basis of the contracts that were entered into for the building. Black's account for the proportion of the schedules and measurements was charged by the various contractors, and was included in the contract prices. The buildings were not gone on with, and this action was raised by Black for payment of his charges, which had been refused.

It was averred by the pursuer that the plan adopted by Deas was in accordance with the usage of the professions or trades to which he and the pursuer belonged, and that Cornelius, the defender, was well aware of the usage.

The defender averred, *inter alia*—"Denied that the defender either employed the pursuer or authorised his employment. Explained that the defender's arrangement with Mr Deas was as follows, viz., that Mr Deas was to draw the plans, make all working designs, do all the surveyor's work, and superintend the erection of the buildings until their completion, for three and a-half per cent. on entire cost. Further, denied that the defender used or issued or authorised the issue of any schedules prepared by the pursuer, or that the amount sued for is due by the defender to the pursuer. *Quoad ultra* denied."

The Sheriff-Substitute (Hallard), after proof, pronounced an interlocutor finding, *inter alia*—"(3) That the employment upon which said work was done proceeded from the witness Deas, whom the defender had selected as his architect; (4) That the defender knew that Deas was not to do the work of a surveyor or measurer himself, and became aware in the course of its execution that the pursuer was doing it; (5) That the pursuer's claim is supported by the constant and uniform custom of trade;" and decerning in terms of the libel. He added this note—

"*Note.*—The owner of a site who desires to build on it employs an architect to prepare the necessary plans. These require a conversion into material for tradesmen's estimates. It is the surveyor or measurer who fulfils that function on the employment of the architect. He measures the plans and issues the schedules of specification for the use of the tradesmen who are invited to estimate thereon. If the work goes on, the tradesmen pay the measurer's fee, which is made an item in the schedules. Where the work does not go on, it is to the owner of the site, or client of the architect, that the surveyor or measurer looks for his fees, including the cost of schedules. That is the constant and uniform practice. Mr Brown's evidence on this point was remarkably clear and decisive. The equity which underlies that practice is that the surveyor's work is done for behoof of the owner with the owner's knowledge. If, in the present case, the architect

agreed to protect the owner (defender) from this liability, the latter will have his action. In the meantime he must pay the pursuer's account."

The Sheriff (DAVIDSON) on appeal adhered.

The defender appealed to the Court of Session.

At advising—

LORD ORMIDALE—The justness of the pursuer's account is not disputed, and it is not alleged that it has been paid by the architect. I can find no trustworthy evidence that Deas was not employed like any other architect, and I have no doubt that an architect so employed in the general way has authority to employ a surveyor, and that the surveyor, if not otherwise paid, has a good claim against the employer of the architect.

LORD GIFFORD—I think that the architect is the general agent of his employer for all the purposes connected with carrying out the contract. Deas was the architect employed by the defender, and as such had power to employ a measurer.

LORD YOUNG—I am of the same opinion. If this architect had been employed merely to prepare plans, and he had employed a surveyor, the architect would be the person liable to the surveyor whom he had employed. But the defender wanted not merely plans but measurements, to see what the works could be executed for. The architect had full power to employ a surveyor to do what was necessary for that purpose. The architect might be liable in an intermediate contract with the surveyor to see that he was paid. But that does not arise in the present case.

The Court adhered.

Counsel for Pursuer (Respondent)—Black. Agents—Curror & Cowper, S.S.C.

Counsel for Defender (Appellant)—Lang. Agents—J. & W. C. Murray, W.S.

Thursday, March 20.

SECOND DIVISION.

[Sheriff of Ayrshire.

GIBSON *v.* MILROY.

Reparation—Personal Injury—Obligation to Carry Lamps when Driving at Night.

Circumstances in which a foot-passenger walking in the roadway on a county road, and injured by a gig driving without lamps on a dark night, was *held* entitled to damages.

Observations (*per* Lord Justice-Clerk) on the obligation to use lamps, and upon the rights of foot-passengers in a carriage-way.

This was an appeal from the Sheriff Court of Ayrshire in an action raised by Margaret Duncan Gibson, daughter of the Rev. Henry Gibson, minister of Glenapp, against Thomas Milroy junior, farmer, Glenapp, concluding for £50 in name of damages for injuries caused to her by being thrown down on the public road near Finnart's Lodge by a dog-cart, the property of and then being driven by the defender.

The pursuer on 23d January 1878, about 7 P.M., left the manse of Glenapp with her mother to get aid in a search for her brothers, who were believed to have wandered on the hills. The night was very dark, with high wind and hail showers, which prevented them from hearing the approach of the conveyance. The defender averred that he was driving in the centre of the road when the accident happened, that the injuries were trifling, and that the pursuer had crossed right in front of the pony he was driving, and was herself solely to blame. The night, he further said, was not so dark as to require lamps, which in any view would have been unnecessary.

The Sheriff-Substitute (PATERSON) found for the pursuer, with £6, 6s. of damages. He proceeded on the ground that the accident might have been avoided by proper care and precaution, and that the gig should have been provided with lamps.

The Sheriff (CAMPBELL) on appeal recalled the Sheriff-Substitute's interlocutor, finding that the pursuer had been culpably negligent of her own safety, and had contributed to the injury. In his note he stated that there was no statutory provision that carriages must carry lights, and that there was no such custom averred.

The pursuer appealed, and argued—A passenger on foot was *ex lege* entitled to be on the road as well as on the footpath. If that was so, then the rule of the road applied, and this was violated by the defender. Further, he had no lamps.

Authorities—*Cowden*, 2 Espin. 685; *Chaplin*, 3 C. and P. 554; *Boss* v. *Lytton*, 12 C. and P. 407.

Argued for the defender—As to lamps, it was contrary to the custom of the country to carry lamps on a gig, and farmers objected to lamps as really tending rather to danger than safety. No doubt passengers were entitled to walk in the road, but if a passenger left the footpath he must exercise caution and care. This was exactly the case of *Williams*. [LORD JUSTICE-CLERK—The defender admits that he saw the pursuer fifteen yards off—that he uttered no warning sound—that he did not pull up. Are those not important facts?] The pursuer seemed to have acted on a sudden impulse to cross. This the defender could not foresee, nor could he suppose she would leave a place of safety and go to one of danger.

Authorities—*Williams*, 3 C. and Kirman, 81, and *Pollock*, C. B., there; *Cotton* v. *Wood*, 1860, 8 Scott's C.B. Reps., N.S., 568, and Erle, C. J., there.

At advising—

LORD JUSTICE-CLERK—In this case I agree with the result arrived at by the Sheriff-Substitute. On such a night as this appears to have been—dark and windy, with hail showers—the defender ought to have had lamps on his gig. I am not prepared to say he should have carried them as a matter of obligation, but he certainly should have done so as a matter of precaution. He saw the pursuer, according to his own statement, when fifteen yards in front of him, and thus had ample opportunity for avoiding a collision; but