have in putting themselves on the register; in the second place, I think there is no antecedent authority proved; in the third place, the evidence does not prove adoption by the executors of Mr Galletly's act, and there is no document communicated to the bank signed by the trustees which can be held to have authorised or approved of the transfer of the stock to their names.

On these grounds I concur with Lord Mure and Lord Deas in thinking that all of the petitioners are entitled to be relieved from responsibility. But I feel bound to add that I think with Lord Deas that there is a difference in the case of the petitioners individually if we were to go upon specialties. The case of Mr Wishart, when one reads his evidence as a whole with reference to the minute of 3d April, and the case of Mr Heron—who unhappily through the misfortune of the bank failing has entirely lost his memory—appear to me to be different, and to present circumstances more serious than that of Mr Nicolson. The letter of Mr Heron of 20th April 1878 in reply to Mr Galletly's letter of the 18th shows that the minutes were communicated to him, and put him very much in the same position as Mr Wishart; and there is altogether more evidence in support of the view that they had knowledge of what was done than I think there is as against Mr Nicolson. The peculiarity of Mr Nicolson's case arises from the circumstances that he was not present when the minute of 3d April was read over. He does not appear to have read that minute when he signed it; and as the case against him really depends upon the statement in that minute, I think this would have made a specialty in his favour, even if we had been constrained to hold that the case against the other executors had been made out. But as I have said, I concur with your Lordships in thinking that while the case is one of difficulty as regards Mr Wishart and Mr Heron, the application should be granted in regard to all of the petitioners.

Lord President—I think this case a narrow and difficult one upon the evidence, but on the whole I have come to concur in the opinion of Lord Mure, and I do not think it at all necessary to repeat the grounds of that opinion.

The Court therefore ordered the names of the petitioners to be removed from the first part of the list of contributories.

Counsel for Petitioner — Dean of Faculty (Fraser)— Mackintosh. Agents — Boyd, Macdonald, & Co., S.S.C.

Counsel for Respondents—Kinnear—Balfour —Asher—Lorimer. Agents—Davidson, & Syme, W.S.

HOUSE OF LORDS.

Tuesday, July 1.

CITY OF GLASGOW BANK LIQUIDATION— (*GILLESPIE & PATERSON'S CASE*) — GILLESPIE & PATERSON *v.* THE LIQUIDATORS.

(Before The Lord Chancellor (Cairns), Lord Hatherley, Lord O'Hagan, Lord Selborne, Lord Blackburn, and Lord Gordon).

(In Court of Session, Feb. 27, 1879, *ante*, p. 473).

Public Company— Winding-up— Where Partners of a Firm held Stock for themselves and the Survivor for behoof of the Firm.

Two persons had carried on business for some years, when it was agreed to form a new firm with a third partner. Prior to the execution of the contract of copartnery, but with a view to the arrangements of the new firm, stock in a bank of unlimited liability was purchased by the original partners and the transfer taken in favour of themselves, "and the survivor for behoof of the firm." The new partner was not a party to the transfer. The entry in the stock ledger was in similar terms. In a petition for rectification of the list of contributories, upon which the names of the two partners were entered, each being described as "trustee for" the firm—*held* (*affirming* judgment of Court of Session) that their names were rightly so entered, each being liable *in solidum*, and not merely for half the amount of stock held by them.

This was an appeal by Messrs John Gillespie and Thomas Paterson against the decision of the First Division of the Court of Session, reported *ante*, p. 473. The circumstances are sufficiently narrated there, and in the opinions of the House of Lords *infra*.

At delivering judgment—

Lord Chancellor—My Lords, I should desire, in the first place, to direct your Lordships' attention to the form in which the list of contributories has been settled in the present case. In the first instance, when the liquidators settled the list of contributories the firm of Gillespie & Paterson were entered upon that list as a firm, and as holding the sum of bank stock in question. That entry has been struck out, and there is no appeal upon that subject; therefore that is out of the question. But there remains two entries, in one of which Mr John Gillespie is entered as the holder of £1000 bank stock as trustee for Gillespie & Paterson, and another entry in which Mr Thomas Paterson is entered as holding £1000 bank stock as trustee for Gillespie & Paterson. It is not in controversy that although there is a mention here of two sums, which might at first sight appear to be separate, they really are one and the same sum; and although perhaps in this country there would have been one entry comprising the two names—both John Gillespie and Thomas Paterson as holders of the sum—the same end is

attained in Scotland by separate entries. There is not any controversy between the parties as to more than a sum of £1000 bank stock being charged against the two names that I have mentioned; but the real question—the question argued upon the appeal before your Lordships—is, how these two persons (the appellants) are to be charged with this sum of £1000 bank stock? The contest of the appellants is that it is stock for which they are to be inserted as liable each for one-half—that is £500—and not as liable *in solido*, each of them for the whole.

My Lords, that depends on the circumstances under which, and the purpose for which, this stock was acquired by these parties. The two appellants had been in partnership, and the partnership was about to be reconstructed with the addition of a third partner, who is not before your Lordships, and, as is stated in the admissions, "prior to the execution of the contract of copartnery, but with a view to the arrangements of the new firm, the £1000 stock in question was purchased by" the appellants to be transferred on the day—in fact it was transferred a few days before—the new contract of copartnery was executed. Now the way in which it was purchased was this—The vendor, the transferror, was Alexander Tod, and he transferred it to Gillespie & Paterson in these words—"I, Alexander Tod, St Mary's Mount, Peebles, in consideration of the sum of £2395 sterling now paid to me by John Gillespie and Thomas Paterson, both Writers to the Signet in Edinburgh, do hereby sell, assign, transfer, and make over to and in favour of the said John Gillespie and Thomas Paterson, and the survivor of them, for behoof of the firm of Gillespie & Paterson, Writers to the Signet, Edinburgh, £1000 sterling of the consolidated capital stock of the City of Glasgow Bank Company," and so on. It is not disputed that "the firm of Gillespie & Paterson" mentioned here means, not the old firm in which Mr Gillespie and Mr Paterson alone were partners, but the new firm in which Mr Gillespie and Mr Paterson were partners with a third party. The transfer therefore is to the two, Gillespie & Paterson, "and the survivor of them, for behoof of the firm of Gillespie & Paterson."

Now, my Lords, what is the meaning of those words "for behoof of the firm of Gillespie & Paterson?" As I understand the condition of the argument on the part of the appellants, it is this—If those words "for behoof of the firm of Gillespie and Paterson" constitute a trust, as we term it—that is to say, make the holders of the stock to hold it in trust for the firm—then it is admitted by the appellants that there is no doubt that they hold it upon that joint account, and that they are properly inserted as liable *in solido*, to be charged each of them with the whole of the £1000. If, on the other hand, there is no trust—if the property remains the property of Gillespie & Paterson without any trust—then the appellants raise an argument as to the Scotch rule where property is held *pro indiviso*, or where an obligation is undertaken *pro indiviso*, and it would be necessary to consider how that rule of Scotch law should be applied.

The first question is, Was there or was there not a trust created by these words? In order to determine that it would be necessary to look to the purpose for which this stock was bought, and the arrangement under which it was to be held. That, my Lords, is to be found in the contract of copartnery which was executed a few days afterwards, but which must be taken to be part and parcel of the same transaction. The two partners Gillespie and Paterson agree to continue partners, "and to assume the said John Hamilton Gillespie as a partner on the terms, *inter alia*, that the copartnership should be continued under the firm of Gillespie & Paterson; that the bank account should be kept in name of the firm" (I may say it is admitted that the old firm had banked with the City of Glasgow Bank, and that the word "bank" here refers to the City of Glasgow Bank); "that the said John Gillespie and Thomas Paterson should supply the necessary capital in equal proportions, either by holding bank stock in name of the firm or by advancing the requisite funds; and that the said John Hamilton Gillespie should receive a certain percentage of the clear profits of the business, the remainder being divided equally between the said John Gillespie and Thomas Paterson."

That, my Lords, exhausts the whole of the materials upon which your Lordships have to come to your decision as to the meaning of the words "for behoof of the firm," and the object for which those words were used. In the first place, I must ask your Lordships to consider this question—Suppose there was not an intention here of creating a trust for the firm, has any explanation whatever been given—has any plausible suggestion been made at the bar—of the purpose for which it is stated that these two persons held the bank stock? They were to hold it so that it was to go to the survivor of them. If they were not holding it for the purpose of a trust, the only other way in which they could be holding it would be for themselves as individuals. If they held it for themselves as individuals, it is contended by the appellants that they were interested equally, each to the extent of one-half of the property. But if that were so, for what possible reason could it be suggested that there should be destination of this property, in which, on that hypothesis, they were equally interested, so that it would go on the death of one, not as to one-half to his representatives and as to the other half to the survivor, but the whole to the survivor? My Lords, I am bound to say that there was not any suggestion made which appeared to me to have even a semblance of plausibility for such an arrangement. On the other hand, if there was a trust, of course it would be most natural to provide that the two persons who were holding the stock for the purpose of implementing and satisfying the trust should hold it so that it would go to the survivor.

Now, my Lords, let us look at what the substance of the case was. The substance of the case was this—That there should be provided in one of two ways what we call capital—that is to say, available assets—for the firm. This was to be done either by way of a supply of money, or by a supply of proprietorship in stock of the bank at which the partnership banked, and which bank therefore would give facilities no doubt in credit for the purpose of the partnership. But an arrangement of the latter kind, in order to make it a practical and useful and real arrangement, must in some way or other give the partnership which was to be benefited some control

over and some interest in that which was to be provided as the capital of the partnership—namely, the bank stock. It was not necessary that the partnership should be out-and-out the proprietors of the bank stock, so that no other person should have any interest therein; but it was necessary that for the purpose of a partnership contract the partnership should have the first claim to have the purposes of a partnership contract satisfied with reference to that bank stock. It may well be that the two persons who bought the bank stock might at any time have come to the partnership and said—"We wish to use this bank stock for another purpose; we wish now to advance the requisite funds in money for the purpose of capital; here are the funds in money which are necessary for the capital, and we claim to take away the bank stock and dispose of it as we think proper." It might well be that when a dividend was declared upon the bank stock the two holders of the stock might say to the partnership—"The bank stock is supplied for the purposes of the partnership, but we do not mean the partnership to have the dividends;" and it might be that the partners would agree to that. It may be that they did agree to that; it was a matter for the partners to arrange amongst themselves. But after and apart from all subsidiary arrangements of that kind there remains the substantial arrangement, which was that the holding of the bank stock was to be either in the name of the firm, or for behoof of the firm, which would be equivalent to that proprietorship and that interest in the stock which there would be if the stock stood in the name of the firm.

My Lords, there is no magic, as was admitted at the bar, in the use of the word "trust." There may be half-a-dozen words in the English language which would bring about the same result as the use of the word "trust," and it appears to me that words which say that one person holds property "on behalf of" or "for behoof of" another are words which come up to and satisfy the idea of the word "trust" just as much as the word "trust" itself, if the circumstances of the case are consistent with that interpretation. Now here, my Lords, the circumstances of the case not only appear to me to be consistent with that interpretation, but to be absolutely inconsistent with any other interpretation. That being so, it appears to me that it is unnecessary to enter upon an examination of those authorities upon Scotch law as to an obligation *pro indiviso* or property held *pro indiviso*. I therefore, upon the ground that it appears to me that there was here a trust created for the benefit of the partnership, advise your Lordships and move your Lordships to affirm the judgment of the Court below, and to dismiss the appeal, with costs.

Lord Hatherley—My Lords, I am of the same opinion. We might in this case have had to inquire into the question as to what the exact effect of the first words used with reference to the interest of the appellants is—whether or not the directing that the stock should go to the survivor of Gillespie & Paterson creates that sort of interest which was described by the Lord Advocate as an interest *pro indiviso*, and gives such a character of severance as would be similar to tenancy in common in this country, and would make each of the proprietors in the present case the proprietor of £500, instead of the two together being liable *in solido* for the £1000. If the matter stood there alone, and we had simply the words saying that the stock was transferred to and held by Gillespie & Paterson and the survivor of them, we should be obliged to come to a conclusion upon that portion of the case, after considering the authority which has been cited from Erskine's Institutes and elsewhere. But the words afterwards superadded, namely, "for behoof of the firm of Gillespie & Paterson," must, I apprehend, have made everybody perfectly aware of what the real nature of the transaction was.

It was decided in *Muir's* case that it is no part of the duty of a creditor of a bank to ascertain what the exact nature of the trust may be on which some shareholders hold stock of the bank. He is told that certain parties hold a fund in trust, and we have now decided in *Muir's* case, and in several cases which have followed it, that the entry that the property is held in trust amounts to a statement by the holder of it, "I am a shareholder;" it affirms the position of the trustee as a shareholder, but for some purpose or other, connected more probably with the interest of the *cestui que* trust than of the creditors, it is thought fit to state upon the register that although the shares which the shareholder in question holds are held by him absolutely, he does not hold them beneficially, but for the benefit of somebody else, that being a matter with which the creditor has nothing to do. That was the principle laid down in *Muir's* case. Therefore here the case is reduced simply to this point—whether or not the words "for behoof of" a given person or persons are equivalent to "in trust for." I have heard nothing that to my mind gives an intelligent explanation of the words which are here used unless they are equivalent to "in trust for."

The difference between saying—This is a fund I put by in order to be ready at all times to fulfil an obligation I have entered into with certain persons for whose behoof I have taken it, on the one hand, and an absolute direct trust on the other, is too shadowy for my mind. I take it that a person who has entered into such an engagement could not relieve himself of that engagement unless he preferred to adopt the other alternative provided for in the deed, namely, to find the money in some other way, in which case he would not have described this fund as held "for behoof of" the other parties. So long as it is held for their behoof, it is held by the shareholder as the absolute owner of it as regards the creditors of the City of Glasgow Bank. As far as regards persons outside the *cestui que* trust, it is held for his behoof. Whether you say you hold "for behoof of" someone, or you hold "on behalf of" someone, or you hold "in trust for" someone, there is no particular magic in the choice of words; all those words indicate that you are not beneficially the owner. You in effect tell the creditors of the concern—As between you and me I am the holder of the stock, but as between me and a third person, with whom you have nothing to do, I am the holder of it for that person's benefit.

I apprehend therefore, my Lords, that this case cannot be distinguished from those which have already come before us. There is no distinction—I cannot call it a distinction, because I cannot perceive a difference—between the words "for behoof of" and "in trust for." I hold the expression "for behoof of" to mean exactly the same as if the words used had been "on behalf of," or "for the benefit of," or any of those other words, of which many might be suggested, which indicate that although to the bank you are the absolute owner of the shares, yet as regards a third person with whom you have entered into an arrangement, you are not that owner, but that makes no difference as regards your position to the bank and to its creditors.

It appears to me, my Lords, that the case is in a very clear and satisfactory state for decision, and that our decision can only be one way, namely, that the judgment of the Court below must be affirmed and the appeal dismissed.

Lord O'Hagan—My Lords, I have really nothing to add. The case appears to me on the whole reasonably clear. I am very glad that the decision to which your Lordships are coming does not necessitate our differing in any way from the Court below with reference to what appears to be the very peculiar condition of Scotch law contrasted with the law of this country—a subject on which of course we should defer very largely to the learned Judges in Scotland.

I may observe, with reference especially to Lord Shand, that it appears to me that we have here to do simply with the entry in the stock ledger and with the meaning of that entry. We have nothing to do with a large inquiry as to the constitution of the company or firm, or with what the relative rights of the members of it may have been. Upon the stock ledger a particular statement is made, and by that statement all parties are bound to stand, whether they be shareholders or creditors of this company. That is the statement which instructs them with reference to the rights they may reasonably suppose to exist. That being so—confining ourselves to that—it appears to me that there is no reasonable ground for doubting that when that statement was read in the ordinary way by persons having access to the stock ledger, the conclusion we are invited by the noble and learned Lord on the woolsack to come to to-day would be the one at which reasonable people would arrive.

Now, my Lords, looking at the words before us, we have first of all a right of survivorship given here. If it were not a Scotch case the matter would be tolerably clear upon that alone. Then we come to the words by which it is said that a trust is established (and these words exist equally in the stock ledger) "for behoof of" the firm. I cannot add anything to what has already been said upon this subject. Those words are substantially equivalent to the words "in trust for" the firm. The Lord Advocate was very forcible and ingenious in pointing out that it was consistent with the terms here used that the property might be in these individuals Mr John Gillespie and Mr Thomas Paterson, who are now under the consideration of your Lordships, while they were merely to use the name of the firm, and no doubt that was a view of the case which required consideration. But, upon the whole, looking at the matter broadly, and with regard to the effect of common language, I think anyone would, as my noble and learned friend has just said, identify the expression "for behoof of" with the expression "in trust for."

This consideration ought, perhaps, to be added to that—We are informed that the establishment of a trust here would put an end to the question about the survivorship and the personal rights of these parties, because a trust requires survivorship from its very nature. In the case before us, when we look at the contract between these parties, and when we see that the two members of the old firm were to supply capital from time to time for the continuing firm, it becomes evident that the reason of the rule with reference to a trust will apply to this particular case. The necessity and the exigency of the case would not be satisfied unless we held that in this particular case there was a trust, or something at all events necessarily involving survivorship, and not merely a *pro indiviso* interest as it was described by the Lord Advocate.

Upon these grounds, my Lords, I think a trust may be said to be fully established. We have, I repeat, only to consider the terms of the entry in the stock ledger; we have not to wander from those terms at all; and taking those terms together we find that they give a right of survivorship and establish a trust; consequently, I am quite of opinion that the proposal of my noble and learned friend on the woolsack should be accepted by the House.

Lord Selborne—My Lords, I am entirely of the same opinion. It appears to me that the judgments of the learned Judges of the Court of Session are altogether satisfactory.

If your Lordships were called upon in this case to enter into the first and principal argument of the learned counsel for the appellants, I apprehend that it would be necessary for your Lordships to consider the doctrine which was cited from the institutional writers of Scotland as to the cases in which contracts and interests in property are, as we should say in England, held in common rather than jointly, *pro indiviso* being the Scotch phrase, which is equivalent to our phrase "in common," and we should not only have to consider the doctrine laid down by those institutional writers generally, but we should have to consider it in connection with the particular clauses of this copartnership deed of the City of Glasgow Bank, and it would be necessary to determine in that case whether or no the application of the doctrine where two persons are registered as proprietors of shares would be consistent with the deed of the bank.

But your Lordships are not called upon now to enter into that inquiry. What your Lordships have to deal with here is a deed which goes on to make the matter clear beyond controversy, and independently of that inquiry, by showing not only that survivorship is expressly provided, which would be wholly unnecessary in the case of a *pro indiviso* deed, but also by the statement that the shares are held "for the behoof of" the partnership, as to which I entirely agree with what has been said by your Lordships.

I will only add that I also think that the Lord President was quite right in saying that, seeing that this is a question as to the rights of partners

in a bank and creditors of the bank against the persons in whose names the shares are registered, it would not be right to go outside the register and the deed of transfer for the purpose of ascertaining anything which may have passed between the parties, and which as between them would vary the effect of the deed of transfer and the register taken by themselves. That effect is, I apprehend, such that nobody could ever reasonably have regarded it as creating anything but a joint interest. As it happens, the extrinsic evidence only confirms that conclusion; but, for my own part, I agree with the Lord President that if it had had the opposite tendency it ought not to have been regarded.

Lord Blackburn—I also, my Lords, am of the same opinion.

I do not think it at all necessary or desirable to enter into the question of Scotch law as to what will make obligations or property *pro indiviso* when according to English notions they would not be *pro indiviso*. I do not think it necessary to inquire whether if two men were entered on the register as proprietors of the stock in question without anything more, it would be *pro indiviso* or not. I observe that Lord Shand gives it as his opinion that it would not. I do not pretend to have entered enough into the matter to say how that would be. But this I think appears clear upon the authorities which have been referred to, that although an obligation may *prima facie* be *pro indiviso*, yet very slight circumstances in the nature of the contract, or an express agreement that it should not be *pro indiviso* but jointly, may prevent its being *pro indiviso*. And as to that, if I understand rightly the books that were referred to, one of the things that have been determined to be sufficient to show that it is not *pro indiviso*, but is joint and several, is if they have expressly said, "We too mean to enter into this obligation conjunctly." I confess I should have been very much inclined to think, although it is not necessary to decide it, that when they say, "We or the survivor of us enter into it," it would be much the same as if they had said, "We enter into it conjunctly." However, it is not necessary to decide that. There is another thing which is borne out by all the Scotch authorities, namely, if the two take a fund or an estate with a fiduciary obligation to manage it for somebody else, the nature of the case requires that it should be jointly. They cannot take it *pro indiviso*, each having a portion of it, and yet manage the whole as one body for the benefit of those who are beneficially interested. Consequently, when it appears that it is taken in trust for somebody else, or that they stand in a fiduciary relation in respect of it to somebody else, that is quite enough by itself alone to show that they must have taken it conjunctly, so as to be jointly and severally parties entering into the obligation—in which case all the rest would follow as self evident.

Now, in the present case, it appeared upon the face of the register—and of the transfer too for that matter—that the shares were taken by John Gillespie and Thomas Paterson, and the survivor of them, "for behoof of the firm of Gillespie & Paterson." It strikes me that the survivorship alone would make a very strong ground indeed for saying that they took it jointly and severally and not *pro indiviso;* but when it comes to be added that they take it "for behoof of the firm of Gillespie & Paterson," I think that at once shows on the face of the matter that as they professed to do something (I need not inquire how much or how little they would actually do) for behoof of the firm of Gillespie & Paterson, they undertook it for the purpose of doing something, be it more or less, for them which they could not have done if they took it *pro indiviso*. Therefore it appears to me that they sufficiently expressed their intention not to take it *pro indiviso*, but to take it jointly and severally. That is quite enough to show that the decision of the Court below is right and ought to be affirmed.

I may add that I agree with the view, which I think is expressed more strongly by Lord Shand, but which is also expressed by the Lord President, that inasmuch as the appellants put this upon the register to be seen by the creditors of the bank, it does not matter whether they really were holding the stock for the benefit of the firm or not. It is quite enough that they said to the creditors and all persons who would see it—"We are holding this for behoof of" (which I think can have no other sense than, partially at all events, "in trust for") "the firm of Gillespie & Paterson." Their saying that was enough to show that they intended to hold it, not *pro indiviso* but jointly and severally; and having done so, it would not have availed then if they could have shown that they were not in fact holding it for the benefit of Gillespie & Paterson. But when you look at the facts, I agree with the Lord President that what is stated upon the register is clearly made out and strictly accurate—that they were holding it in trust for the firm.

Lord Gordon concurred.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Counsel for the Appellants—Lord Advocate (Watson)—Chitty, Q.C. Agent—W. A. Loch, Solicitor.

Counsel for the Respondents—Kay, Q.C.—Benjamin, Q.C. — Davey, Q.C. — Asher. Agents—Martin & Leslie, Solicitors.

Tuesday, July 1.

CITY OF GLASGOW BANK LIQUIDATION—(*J. C. CUNINGHAME'S CASE*)—JOHN CHARLES CUNINGHAME *v.* THE LIQUIDATORS.

(Before the Lord Chancellor (Cairns), Lord Hatherley, Lord O'Hagan, Lord Selborne, Lord Blackburn, and Lord Gordon.)

Public Company—Winding-Up—Liability of Trustee—Where Stock Purchased by Trust—Want of Signature to Transfer—Authority.

Held (*affirming* judgment of Court of Session) that where there was antecedent authority given to the law agent by a trustee to purchase stock in the City of Glasgow Bank, followed by subsequent recognition