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

on the part of the trustee of the purchase of the stock in a letter of mandate to draw dividends, the trustee's name was properly entered upon the bank's register, and subsequently on the bank's failure upon the list of contributories, and that it made no difference that the truster's signature was not appended to the deed of transfer.

Observations per Lord Selborne and Lord Blackburn upon the decision of the House of Lords in *Lumsden* v. *Buchanan* with reference to the case of Dr Andrew Buchanan.

This was an appeal against the judgment of the First Division of the Court of Session finding that the appellant John Charles Cuninghame, along with four other trustees—the Earl of Eglinton, William Blair, Frederick Blair, and Roger Montgomerie—was rightly placed upon the list of contributories of the City of Glasgow Bank. The case is not reported in the Court of Session, but the facts so far as it is distinguishable from other previously reported cases sufficiently appear from the opinions of the House of Lords *infra*.

The trustees who had signed the transfer were separately reported.

The respondents were not called on.

At delivering judgment—

Lord Chancellor—My Lords, it must be perfectly obvious to your Lordships, and must almost, I think, have been apprehended by the parties at the bar themselves, that the principles on which this House has proceeded in the former cases connected with this bank which have come before it completely dispose of the present appeal. Indeed, the facts of the present case are, in my judgment, less favourable to the appellant than the facts in many of those previous cases were.

It is only necessary that I should remind your Lordships that there being five trustees, as to whose appointment and whose consent to act there is no question—five trustees of the marriage settlement of Mr and Mrs Cuninghame—in the year 1875 certain trust funds belonging to that marriage settlement fell to be invested. The spouses desired that a certain portion of those trust-funds should be invested in bank stock of the City of Glasgow Bank, and a request for that purpose was signed on the 6th of August 1875 by Mr and Mrs Cuninghame. It is addressed to the five trustees, it states that a sum of £12,000 of the trust-funds is to be reinvested, and it requests the trustees in these words, "that you will authorise the same to be reinvested in stock of the following banks, in your own names as trustees, at the price of the day," and among other investments mentioned is "the City of Glasgow Bank, £1450 stock." Now, my Lords, that being a clear and distinct request to make the purchase in their own names, it is answered by the five trustees all signing in this way—"We hereby sanction and approve the above investments."

That being the request, and that being the answer, it is stated among the admissions that "Mr Thomas Strong, Writer to the Signet, Edinburgh, was the duly appointed law agent of the trustees;" that the bank stock was purchased, and that he (Strong) conducted the arrangements for the transfer of the bank stock; and it is stated that he "acted in the matter under the instructions and letter mentioned in the foregoing article," the letter and instructions being what I have already read as passing between the spouses and the trustees. Then it is stated that the "transfers were sent to the bank by Mr Strong acting as the law agent of the trustees, and under the instructions and letter before mentioned, on the 11th of December 1875, for the purpose of being registered in the books of the bank."

My Lords, I stop there for the purpose of saying that in law that was of course just the same thing as if those five trustees had themselves in their own persons walked to the bank with the transfers, and had there actually registered them themselves in their own names. The letter which Strong sent with the transfers is this—"Referring to the latter part of your letter of the 8th, I now enclose three transfers of £1450 stock (£450, £500, and £500), signed by a majority and quorum of the marriage-contract trustees of Mr and Mrs John Cuninghame (the purchasers), conform to accompanying printed schedule."

Now, turning to the transfer itself which was handed in, it is in the usual form, and I have only to read a few lines from the central part—the trustees, the Earl of Eglinton, John Charles Cuninghame, William Blair, Frederick Blair, and Roger Montgomerie, "by acceptance hereof, being, in terms of the contract of copartnership of the said bank, subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract"—that is the contract with the bank. It does not say that they have to become subject to the conditions of the copartnership by their executing the transfer, but by their acceptance of the transfer which was made to them. That acceptance may be in many ways besides the execution of a deed. The deed, we find, was executed by a quorum of the trustees; but, as I said, it was accepted by the whole five through their act in taking it as their deed—their instrument or title—and asking the bank to act upon it by transferring the shares into their own names.

That, my Lords, being what was done towards the bank, and that instrument having been sent in stating that they accepted this stock "subject to all the articles and regulations of the said company, in the same manner as if they had subscribed the said contract," let us see what the articles of the company in fact say—articles 37 and 38 are referred to. Article 37 says—"Where the shares of any partner are transferred, conveyed, or sold in terms of the above articles, and that either by the partners or directors, the deed of transference thereof shall be prepared by such person as the ordinary directors may appoint at the Head Office in Glasgow, in such form and terms as the said directors may from time to time appoint." Then the 38th article says—"The said deed of transference, as also every assignment of shares in security, or *mortis causa*, and confirmations thereof by right of succession, shall, after being completed, be recorded in a book to be kept for that purpose"—I stop there for the purpose of saying that I do not read these words "after being completed" as meaning of necessity after being executed by every transferee. It may be completed as between the transferor and the transferee by the execution of the transferor, if the transferor does not require more to be done, and if he is satisfied that the transferee has accepted

and chooses to rest upon the rights which will follow from that acceptance—"and such deeds, transference, assignments, and confirmations shall be delivered or returned to those in right of the same after having marked thereon a certificate of the registration thereof: And it is hereby declared that the production of such writings to the said manager or ordinary directors for the purpose of registration shall *ipso facto* infer"—that is, infer towards the bank, not towards the transferor; he and the transferee had settled between themselves before; it means infer towards the bank—"the acceptance of the capital stock therein specified, and the liabilities of the parties having right to the same as partners of the company." I have pointed out to your Lordships that by sending in the transfer, those who sent it in agreed to take the shares according to whatever were the provisions of the contract of copartnery, and this which I have read was one of them.

Now, my Lords, to that I will only add, that after this was done I find this further document executed by four of the trustees, including the present appellant. It is dated the 13th of December 1875, and it is addressed to the secretary of the City of Glasgow Bank:—"Sir—With reference to the sum of £1450 of the capital stock of the City of Glasgow Bank *standing in our names* as trustees under the contract of marriage between John Cuninghame, Esq., residing at the Pavilion, Ardrossan, in the county of Ayr, and Mrs Mary Blair or Cuninghame, dated 21st April 1873, we hereby request that until further instructions the dividend-warrants on said stock may be made payable to" Mrs Cuninghame.

My Lords, I have never seen in my recollection of joint-stock cases a case in which the catena of the title was so complete in every substantial point as it is here. The only thing that can be suggested as not being present is the formal imposition of a seal by the appellant to the deed of transfer. That, my Lords, seems to me to be the purest form, the merest ceremony, and the want of it can have no substantial operation whatever in the present case. You have from a time antecedent to the purchase of the stock the declared intention, consent, and authority of every trustee to buy this stock, and to have it placed in their own names. You have every step taken which was thought necessary by the bank, or by any person else, to procure the stock to be transferred into their names. You have it actually transferred in the books of the bank into their names; and you have under their own hand an immediate recognition by the present appellant and his co-trustees that it was so transferred; and you have them at once entering into the enjoyment of the property transferred by drawing dividends.

My Lords, that really is a case which is not susceptible of argument. I need not go into the other part of the case, as it was not relied upon at the bar. I have only to submit to your Lordships that the appeal should be dismissed with costs.

Lord Hatherley—My Lords, I am of the same opinion. It appears to me that I should be wasting your Lordships' time if I were to detain you with many observations after the numerous cases which you have heard upon the same subject, some of which certainly presented the facts in a light more favourable to the appellant than the facts in the present case. As has been pointed out by my noble and learned friend who has preceded me, I conceive that in the present case the appellant has not only—within the 38th article—so acted as to entitle the company to say, as against him, that there had been an acceptance, but that he has also acted upon that acceptance, for he has drawn the dividends; he has concurred with the other trustees in requesting that the dividends, which would otherwise have been payable to himself and to them, should be paid to the lady who is entitled to them under the contract of marriage. Therefore, my Lords, I think that this case is, if anything, stronger than the others we have had before us with reference to the same bank. I will not say far stronger, but stronger for placing the appellant in the position in which the previous authorities have placed the appellants in some of the other cases.

Lord O'Hagan—My Lords, unless we are prepared to ignore a series of decisions unanimously pronounced by the Court of Session, and unanimously affirmed by your Lordships' House, we cannot hesitate to adopt the proposal of my noble and learned friend on the woolsack.

This is, in my opinion, a stronger case than most of those with which we have had heretofore to deal. We have here an antecedent sanction and authority given by this gentleman with the other trustees, which has not merely a general reference to what was to be done, but is a sanction distinctly approving of the investment, which is expressly stated and clearly described. That appears to me to involve in it the authority not merely to the agent but to everybody for the investment, with all the incidents of the investment, one of which was to put the investor on the register. That antecedent authority was followed by subsequent recognition in the letter of mandate which has been read by my noble and learned friend on the woolsack, which at once establishes the appellant's full knowledge of the transaction which had been so antecedently authorised, and the taking advantage of it for the purposes of the trust. Under those circumstances I am clearly of opinion that we have no alternative in this case but to affirm the judgment of the Court below.

Lord Selborne—My Lords, I am also of the same opinion. My noble and learned friend on the woolsack has remarked upon the absence of a seal to this deed of transfer. I rather think there is some misapprehension about that. I do not see that there is any want of a seal. I take it that what my noble and learned friend meant was that the only circumstance upon which an argument could be founded was the absence in the instrument of transfer of two signatures. However, I only mention that because I myself understand that to be the state of the case as it has been put forward.

My Lords, I should like to make one observation, and one only, upon the case which has been relied upon in the argument—namely, the case of *Lumsden* v. *Buchanan*, so far as regards Dr Andrew Buchanan. It is not at all necessary to consider to what extent and for what purposes that ought to be regarded as an authority which this House would consider binding upon itself in a case similar in its circumstances to that; but in order

to prevent that case being relied upon for purposes to which it is certainly inapplicable, I cannot help thinking it worth while to take notice of what was supposed to be the ground of the decision of that case, whether right or wrong. I would not say that the decision of this House ought to be regarded as being possibly wrong—I mean, what it was upon which the decision probably proceeded.

The House, I suppose, considered that every entry upon a register ought to have reference to a title; that the antecedent title there was shown to be anonymous — not to be Dr Andrew Buchanan's; and probably the House may have thought that there would be so much confusion and uncertainty and misconception as to the effect of the register in the mode of registration adopted as to make it unsafe to suppose that the registration could be attributed to any other title than that which was actually produced, that being a title not extending to Dr Andrew Buchanan. That I have always supposed must have been the ground of the decision—that the House did not think that there was any transfer intended, and that they did not think—in fact they could not possibly think on the facts before them—that the original contract was made by or on behalf of Dr Andrew Buchanan. Under these circumstances the House seems to have disregarded the registry altogether, although it was perfectly well known to Dr Andrew Buchanan, and acted upon by him, because they could not connect it with the antecedent title.

Lord Blackburn—My Lords, I am entirely of the same opinion. I take it that under the Act of 1862, when a name is entered upon the register, a person entitled as a shareholder is *prima facie*, —until the contrary is proved—to be taken as a shareholder. Section 23 of the same Act says that "every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." The question therefore comes to be, whether it is shown that Mr Cuninghame (the appellant in this case) had agreed to become a member of this company. In the case of *Lumsden* v. *Buchanan*, as I understand the facts to have been there, the House of Lords—although there is scarcely a word said in their judgment about the case of Dr Andrew Buchanan—seem to have come to the conclusion that he was not shown, as a matter of fact, to have intended to become a shareholder. If so, that may have been quite right on the facts of the case, or it may even have been a mistake upon the facts of that case, but it does not govern another case where the facts are quite different.

Here Mr Cuninghame agreed to become a shareholder in every way in which any man can agree. He under his own hand authorised the buying of the shares in his name by his agent, who had authority to act on his behalf; he caused the documents to be drawn up in such a way that the shares would be transferred into his name by his agent. Again, he wrote to the company saying that only three, which was a quorum, had signed the transfer, and asking them, though not in these precise words, to register the names of the five trustees, inasmuch as a quorum had signed. Immediately after that, he with his own hand wrote a letter saying that the shares were now standing in his name and asking that the dividend upon them should be paid in a certain way. Stronger evidence that he directed his name to be entered upon the register and agreed to be a shareholder I cannot conceive. If the learned counsel for the appellant had been able to show that there was any principle of the law of Scotland, or of the general law, which said that a man cannot be held to have become a shareholder in a company without signing his name to a transfer, that would have been another affair; but there is no pretence for saying that there is any such rule of law; and I think that the terms of the 38th section of the articles of the City of Glasgow Bank do not mean that. Even if they did, I do not think it would lie in the mouth of anyone, after the transfer had been made and had been acted upon for some time, and after the creditors had had an opportunity of seeing it, to say that it should have the effect of controlling the Act of Parliament.

Lord Gordon concurred.

Lord Chancellor—I am obliged to my noble and learned friend for pointing out that in speaking of the transfer in this case I used the expression "sealed" as applied to those who were parties to it as transferees. I ought to have used the expression "signed." If the document had been intended to be sealed (which I see it was not), even then the absence of the seal, I think, would have placed it in just the same position as the absence of a signature. As it is, the observations I made apply to the absence of an actual signature or two signatures.

Interlocutor appealed against affirmed, and appeal dismissed with costs.

Counsel for the Appellant—Herschell, Q.C.—Chitty, Q.C. Agent—William Robertson, Solicitor.

Counsel for Trustees who signed Transfer—Lord Advocate (Watson), Q.C.—Pearson, Q.C. Agent—Preston Karslake, Solicitor.

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

Tuesday, July 8.

PHOSPHATE SEWAGE COMPANY (LIMITED) *v.* MOLLESON (PETER LAWSON & SON'S TRUSTEE).

(Before the Lord Chancellor (Cairns), Lord Hatherley, Lord Blackburn, and Lord Gordon.)

(In Court of Session July 5, 1878, *ante*, vol. xv. p. 666, 5 R. 1125.)

Res judicata—*Competent and Omitted—Case of a Claimant in a Sequestration making a Second Claim.*

Averments in two successive claims in a sequestration in consequence of which—*affirming* judgment of Court of Session—the