

As to the merits of the application, I am entirely of the opinion expressed by your Lordship. I think that the fact that the partnership was dissolved by the marriage of the female partner rather than by her death, tells against her application. No one dies willingly, but this lady entered into her marriage willingly. She dissolves the partnership by her own voluntary act. If she desires to call the other partners to account, she can do so by an action of accounting against the parties carrying on the business. She might have done so at once, but there is nothing to prevent her from doing it now. But the law will not sanction the removal of the parties at present carrying on the business by the appointment of a judicial factor.

The other Judges concurred.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel for the parties on the reclaiming-note for the respondents Thomas Russell and Margaret Russell against Lord Craighill’s interlocutor, dated 31st October 1874, Recall the said interlocutor; refuse the petition, and decern; find the petitioners liable in expenses, allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report.”

Counsel for Petitioners—R. V. Campbell. Agents—J. & R. D. Ross, W.S.

Counsel for the Respondents—Dean of Faculty (Clark) and Maclean. Agents—Morton, Neilson, & Smart, W.S.

Thursday, November 12.

## FIRST DIVISION.

[Lord Mackenzie, Ordinary.]

### FLOWERDEW v. LOWSON.

*Succession—Special Legacy—Testator’s Debts.*

A domiciled Scotchman, who was a partner in a firm in Oregon, United States, where he died, left a will to the following effect:—  
“*First*, I desire all my debts and liabilities to be paid. *Second*, After payment of my debts as aforesaid, I give and bequeath a number of legacies. *Seventh*, After payment of the bequests beforementioned, I wish and direct the remainder of my money which may remain out of what may be collected of my life policy of insurance to be paid” to certain persons named. *Eleventh*, All the property I have or may be entitled to in Scotland I give and bequeath” to A. Held that the bequest of the Scotch estate was not a special legacy, and that the said estate was liable for the testator’s debts rateably with the estate in America.

This was an action of declarator brought by Henry Flowerdew, Edinburgh, against William Lowson, merchant in Dundee, in the following circumstances:—Both parties were beneficiaries under the will of the deceased James Gray Flowerdew, a native of Dundee, and a partner in the firm of Hewitt, Flowerdew & Company, merchants in the city of Portland, in the State of Oregon, United States of America, where he died on the 22d July 1872. The said James Gray Flowerdew’s last will and testament was as follows:—“In the name of

God, Amen.—I, James G. Flowerdew, of the city of Portland, in the county of Multnomah, and State of Oregon, of the age of thirty-seven years, and being of sound mind and memory, do make, publish, and declare this my last will and testament in the manner following, that is to say:—*First*, I desire all my debts and liabilities to be paid. *Second*, After the payment of my debts as aforesaid, I give and bequeath to Henry Hewitt, my partner in the firm business of Hewitt, Flowerdew & Co., the sum of fifteen hundred dolls. *Third*, It is my direction to my executor that he loan to Henry Hewitt the sum of two thousand five hundred dolls., on three years’ time, with interest at the rate of five per cent. per annum, without security. *Fourth*, I give and bequeath to Trinity Church, at the city of Portland, the sum of one-hundred and seventy-five dollars. *Fifth*, I give and bequeath to the Right Revd. B. Wistar Morris the sum of two hundred and twenty-five dolls., to be by him used either for religious or charitable purposes. *Sixth*, I request and direct my executor to use and expend the sum of seventy-five dolls. in the purchase of a diamond ring in token of the esteem I hold to him, and the same keep in remembrance of me; also to use a like sum for the purchase of a diamond ring, and the same to present to my esteemed friend Mr Edwin Russell; also to use a like sum for the purchase of a diamond ring, and the same to present to my esteemed friend J. D. Walker, of the firm of Faulkner, Bell & Co., of San Francisco, California. *Seventh*, After the payment of the bequests hereinbefore mentioned, I wish and direct the remainder of the money which may remain out of what may be collected of my life policy of insurance to be paid over to James D. Walker, Esq., who I will and direct to invest the same upon interest, payable semi-annually, and the interest so accruing and arising from the use of the said remainder to remit to William Lowson, Esq., for the benefit of my uncle Henry Flowerdew, so long as he may live, and upon the death of my said uncle Henry Flowerdew I will and bequeath of such remainder the sum of two thousand dollars to my brother William Flowerdew, now residing at Monte Video, Buenos Ayres, and the sum of two thousand dollars to my sister Mrs George Park M’Intire, wife of George Park M’Intire, of Glasgow, Scotland. *Eighth*, Upon the payment of the loan of Henry Hewitt of twenty-five hundred dollars, and upon the realisation of any moneys that may be due to me as a partner and member of the firm of Hewitt, Flowerdew & Co., I will and bequeath the same to my sister Ellen, wife of the aforesaid William Lowson, Esq., and of such moneys I desire her, at her discretion, to use the sum of two hundred dollars in dispensing charity in my native town. *Ninth*, I give and bequeath to Ivan R. Dawson the writing-desk now in my room, and to my friend George Good the table therein, and I give and bequeath to my sister, the wife of William Lowson, Esq., the watch I wear. *Tenth*, I give and bequeath to Henry Hewitt all the remainder of my furniture, also my clothing, jewellery, and paraphernalia, to be by him used and disposed of at his pleasure. *Eleventh*, All the property I have or may be entitled to in Scotland I give and bequeath to Wm. Lowson aforesaid, to be administered and disposed of as he may deem best, whether the same be real or personal property. I hereby nominate and appoint my friend Ivan R. Dawson to be my sole executor of this my last will and testament, and for the dis-

charge of the trust hereby reposed in him it is my will that he shall not be required to give bonds. In witness whereof I have hereunto set my hand and seal this 15th day of July, A.D., 1872, one thousand eight hundred and seventy-two."

The pursuer averred that the whole debts and liabilities of the deceased were paid by the executor nominated in the will out of the proceeds received by him under the policy of insurance on the life of Mr Flowerdew for 10,000 dollars, granted by the Life Insurance Company of America. The pursuer also averred that Mr Flowerdew was indebted to his firm of Hewitt, Flowerdew & Company at the time of his death, and had no other funds in America, and no other estate except the property in Scotland bequeathed to the defender. The pursuer accordingly, who was liferenter of the remainder of the proceeds of the policy of insurance, brought this action, which concluded *inter alia* for declarator that "the said property of the said James Gray Flowerdew, belonging or to which he might be entitled in Scotland, and which has been given and bequeathed by him, under the 11th head or article of his said last will and testament, to the defender the said William Lowson, is liable for the debts and obligations of the deceased James Gray Flowerdew, and that the said William Lowson is, in respect of said bequest, or otherwise, bound to relieve the said insurance money from said debts and obligations to the full extent of said property; or otherwise that he is bound to bear a proportionate part of the deceased's debts and obligations along with the beneficiaries in said insurance money.

The Lord Ordinary (MACKENZIE), pronounced the following interlocutors:—

"*Edinburgh, 27th May 1874.*—The Lord Ordinary having heard the counsel for the parties and considered the closed record, and last will and testament of the deceased James Gray Flowerdew, of which No. 20 of process is an official copy, under the hand of the clerk and registrar of the County Court of Multnomah, State of Oregon, United States of America, in which the original will is filed and recorded,—Finds that, according to the true construction of the said last will and testament, all the property which the said James Gray Flowerdew had, or was entitled to in Scotland, at the time of his death, on 22d July 1872, and which was given and bequeathed to the defender by the eleventh article of the said last will and testament, is, in a question with the pursuer, not liable in payment of the debts and liabilities of the said James Gray Flowerdew, or of any part thereof: Reserves all questions of expenses; and appoints the cause to be put in the motion roll of 29th instant for the disposal of the conclusions of the summons.

"*Note.*—The parties are at variance as to the domicile of the deceased Mr Flowerdew, the pursuer averring that he died a domiciled Scotchman, and the defender maintaining that when he died in the city of Portland, in the State of Oregon, he was permanently resident in the United States of America. But both parties concurred in asking the decision of the Lord Ordinary as to the construction of Mr Flowerdew's last will and testament according to the law of Scotland, and by joint minute, No. 25 of process, they concur in stating that the rules of the law of Oregon for the construction of that will do not differ from those of the law of Scotland, and on this footing they dispense with probation on the subject of domicile.

"The whole debts and liabilities of the deceased have been, the pursuer avers, paid by the executor nominated in the will out of the proceeds received by him under a policy of insurance on the life of Mr Flowerdew for 10,000 dollars, granted by the Life Insurance Company of America. And it is alleged that Mr Flowerdew was indebted to his firm of Hewitt, Flowerdew, & Company at the time of his death, and had no other funds or property in America except twenty dollars found in his possession, and no other estate except certain property in Scotland. The present action has been raised by the pursuer as the liferenter of the remainder of the proceeds of the policy of insurance, for the purpose of having the whole debts and liabilities defrayed out of the property in Scotland belonging to Mr Flowerdew at the time of his decease, which is given and bequeathed by the will to the defender, or, at all events, of having a proportionate part of said debts and liabilities paid by the defender as legatee of the property in Scotland, along with the beneficiaries in the insurance money.

"The Lord Ordinary is of opinion, as in a question between the pursuer and the defender, both being beneficiaries under Mr Flowerdew's last will and testament, that, according to the true construction and legal effect of the last will and testament by the law of Scotland, the property in Scotland bequeathed to the defender is not liable in payment of Mr Flowerdew's debts and liabilities, or of any part thereof, but that the same fall to be borne by the proceeds received under the policy of insurance on his life.

"The testator in his will deals separately with three descriptions of property. He first disposes of the sum to be received under his life policy. He then bequeaths the whole sums he expected would be received in respect of his interest in the firm of Hewitt, Flowerdew & Company, of which he was a partner. And he lastly bequeathed his whole property in Scotland. The terms of the will in regard to these three kinds of property are such as to show, the Lord Ordinary thinks, that it was his intention that the debts should be paid out of the proceeds of his life policy.

"The testator, in the first place, desires all his 'debts and liabilities to be paid.' The will then proceeds: 'Second, After the payment of my debts as aforesaid, I give and bequeath to Henry Hewitt, my partner, 1500 dollars. Third, It is my direction to my executor to loan to Henry Hewitt' 2500 dollars for three years at 5 per cent. per annum. He then, by the fourth, fifth, and sixth articles of his will, bequeathed several small legacies, amounting in all to 625 dollars. The seventh article is in the following terms:— 'Seventh, After the payment of the bequests hereinbefore mentioned, I wish and direct the remainder of the money which may remain out of what may be collected of my life policy of insurance to be paid over to James D. Walker,' who is directed to invest the same, and to pay the interest to the defender for the benefit of his uncle, the pursuer, during his life; and upon his death 2000 dollars of the said remainder are bequeathed to his brother William Flowerdew, and a like sum to his sister Mrs M'Intire.

"There was thus only given to the pursuer the liferent of what should remain of the proceeds of the insurance policy, 'after the payment of the bequests hereinbefore mentioned.' Now, these be-

quests are only payable by the terms of the will after the payment of his debts, therefore the life-rent which was given to the pursuer was a life-rent of the residue of the proceeds of the policy which should remain after payment, not only of the bequests, but also of the testator's debts and liabilities.

"The terms of the subsequent bequests of the interest as a partner, and of his property in Scotland, also, it is thought, confirm this view. The eighth article of his will bears, that upon repayment of the 2500 dollars directed to be lent for three years to Mr Hewitt, 'and upon the realisation of any monies that may be due to me as a partner and member of the firm of Hewitt, Flowerdew & Company, I will and bequeath the same to my sister Mrs Lowson,' that is, it is thought, the whole monies, without deduction, which might be due to him as a partner. The eleventh article of the will is to the following effect:—'Eleventh, All the property I have or may be entitled to in Scotland I give and bequeath to Wm. Lowson aforesaid, to be administered and disposed of as he may deem best, whether the same be real or personal property.'

"Further, this bequest of all the property which he had or was entitled to in Scotland, constitutes, the Lord Ordinary thinks, a specific legacy and title to the defender to the whole of such property, free from liability for the testator's debts as in a question with the beneficiaries entitled to the residue of the insurance money."

"2d June 1874.—The Lord Ordinary having heard counsel, and resumed consideration of the process, assoziates the defender from the conclusions of the summons, and decerns. Finds the pursuer liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax, and to report."

The pursuer reclaimed, and argued—In any sense in which the bequest of the property was a special legacy, the other legacies were special also. For the policy paid was just as specially appropriated to the legatees upon it as the Scotch property was to Lowson, and in each case the legacy was of a specific quantity. Then the words "after payment of my debts" covered the whole bequests in the will and showed that whole property wherever situated was liable for the testator's debts.

The defender argued—The bequest of "all the property I have and may be entitled to in Scotland" was in the strictest sense of the term a specific or special legacy. The legacies, on the other hand, payable out of the policy fund were only legacies of a remainder. The testator treated the policy as residue, for he charged all his legacies (except this one specific legacy) on it. But if he charged all his legacies upon it, *a fortiori* all his debts were chargeable on it. The subject of a special legacy might be liable for payment of debt, but the subject of general legacies must first be exhausted before it could be touched.

At advising—

LORD PRESIDENT—When a testator leaves separate property in different places, each part of the property is liable ratably for his debts. It requires a pretty clear expression of intention to show that the incidence of the law is not to apply.

In reading this will the first thing that appears is the desire of the testator that all his debts should be paid. If he had intended that the

debts should be paid out of one part of his estate, this is the place where the direction should have been. I am very far from saying that such a direction might not occur elsewhere. He might, for example, in bequeathing a particular legacy, say that it was not to be liable to deduction, but to be free from payment of debts. Or he might bequeath a special legacy in such a way as to show that he intended that the residue should relieve that legacy of all debts. But here there is a general direction—"First, I desire all my debts and liabilities to be paid," and then he proceeds—"Second, After the payment of my debts as aforesaid, I give and bequeath to Henry Hewitt, my partner in the firm business of Hewitt, Flowerdew, & Co., the sum of fifteen hundred dolls." That is the only place where the words "after the payment of my debts as aforesaid" occur. But it cannot be denied that the words are implied in every other part of the deed. I can see no reason why they should not be held to apply to the 11th clause.

It is said that the 11th clause contains a special bequest, and in a certain sense that is so. One part of the estate, namely, "all the property I have or may be entitled to in Scotland" is given to William Lowson. In another sense it is not a special bequest, as it does not give a particular subject. It seems to me that that portion of the estate situated in America is also the bequest of a special bequest. It appears to me that it is no less a special bequest because it is given to several legatees. Each is given a specific quantity, and is a *legatum quantitatis*, and is therefore a special bequest. The policy fund is just as much specially appropriated to legatees as the Scotch property is to William Lowson. Therefore it seems to me that there is enough to show that a fair construction of this will is that each part of the estate should be answerable for a share of the debts.

But it is sufficient for the decision that the testator has not clearly said that he intended to abrogate the usual rule of law. Therefore I am opinion that we ought to alter the interlocutor of the Lord Ordinary, and find that the estates, both in Scotland and in America, are ratably liable for the testator's debts.

The other Judges concurred.

The Court pronounced the following interlocutor;—

"The Lords having heard counsel on the reclaiming note for Henry Flowerdew against Lord Mackenzie's interlocutors of 27th May 1874 and 2d June 1874,—Recal the said interlocutors; find that according to the sound construction of the will of the late James Gray Flowerdew that portion of the testator's moveable estate which is situated in Scotland is not exempt from liability for a due proportion of the testator's personal debts, and that the parties interested in the portion of the said estate situated in the United States are not bound to relieve the defenders of the proportion of the testator's personal debts which according to the ordinary rule of law falls on the Scotch part of the estate: Remit to the Lord Ordinary to proceed with the cause as shall be just and consistent with the above findings: Find the pursuer (reclaimer) entitled to expenses from the date of the Lord

Ordinary's interlocutor of 27th May 1874, reserving to the Lord Ordinary to dispose of all questions of expenses incurred prior to that date; and remit to the Auditor to tax the amount of the said expenses now found due, and report to the Lord Ordinary, with power to his Lordship to decern therefor."

Counsel for the Pursuer—Solicitor-General (Watson) and Scott. Agent—George Begg, S.S.C.

Counsel for the Defender—Dean of Faculty (Clark), Q.C., and G. Smith. Agents—Wotherpoon & Mack.

Friday, November 13.

## FIRST DIVISION.

### PATTISON V. BALLINGAL.

#### Partnership—Contract—Firm-name.

A contract of copartnership fixed the respective shares of the partners, and further provided that, in the event of his surivance, the junior partner was to carry on the business under the firm-name, and was to be chargeable with the payment of certain sums to the representatives of the senior partner, but only after setting aside a yearly minimum sum from the profits of the concern as his own share. On the death of the senior partner, the junior, by the advice of his principal clients, entered into a fresh partnership with another firm, in which his share fell considerably short of the sum allotted to him under the former contract. Held that he was not bound to account to the representatives of his former partner, or to make any payment to them in respect of the business which his said clients transferred to the new firm.

The summons in this case was issued on 11th July 1871, at the instance of Mrs Annie Condie or Pattison, eldest daughter and executrix-dative of Mr James Condie, solicitor, Perth, and wife of Mr Frederick Hope Pattison, blacking-manufacturer in Glasgow, along with her husband, against Mr Andrew Hunter Ballingal, Writer to the Signet, of the firm of Messrs Geo. Condie, Conning, & Co., writers, Perth. The purpose of the summons was to have it declared that a contract of copartnership, entered into by Messrs Condie & Ballingal on 22d January 1869, and particularly the eleventh article thereof, was still a subsisting contract, and that Mr Ballingal was bound to fulfil the obligations which in that article were undertaken by him. The summons then contained a requisition for an account of the profits of the firm of Messrs Geo. Condie, Conning, & Co., from 12th May 1870, (the date of Mr Condie's death), till 19th July 1871, in order to decree against Mr Ballingal for £2000, or such sum as should for that period be found due to Mrs Pattison, as Mr Condie's legal representative. The summons also contained an alternative claim of damages to the amount of £5000 against Mr Ballingal, in case he should be found to have successfully evaded the contract of copartnership. In support of the summons the following articles of the contract of copartnership were relied upon, viz.—

"Sixth.—In the event of the business being carried on by Mr Ballingal after the death of Mr Condie, he shall pay to Mrs Alexandrina Condie,

widow of Mr George Condie, solicitor, Perth, (now Mrs Cross), the sum of £200 on 31st December in each year of the ten years immediately succeeding the death of Mr Condie, declaring that in the event of the death of Mrs George Condie (now Mrs Cross), the annuity shall be payable to her daughter Laura, or to her guardians during her minority.

"Eleventh.—In the event of Mr Condie predeceasing Mr Ballingal, it shall nevertheless be competent to Mr Ballingal to continue to carry on business under the firm of Condie & Ballingal but in that case the sum of £1000 shall annually be set aside for Mr Ballingal out of the free proceeds of the business after deduction of clerks' salaries and other expenses and the annuity before provided for, and the remainder only of the free proceeds shall be divided, and that into three equal portions,—of which two shall be paid to Mr Condie's legal representative, and the other third portion shall belong to Mr Ballingal.

"Twelfth.—It shall be understood that in the event of Mr Ballingal continuing the business after the death of Mr Condie, and its becoming expedient for him to assume a partner into the same, he shall give a preference to such one of the grandsons of Mr Condie as may qualify himself for the business."

Then, founding upon those articles, Mr and Mrs Pattison alleged that Mr Ballingal had, upon Mr Condie's death, adopted the device of changing the name of his firm from "Condie & Ballingal" to "Geo. Condie, Conning, & Co.," for the purpose of defrauding the representatives of Mr Condie of their just rights, and, if possible, of evading his obligations; that letters had been sent by him to Mr Condie's clients with the view of securing their business to himself, and of appropriating to himself the goodwill of the business of Condie & Ballingal, and the whole profits to be derived from the business; and that since Mr Condie's death he had continued to transact the business of the clients, and of the firm of Condie and Ballingal, in all respects as formerly, under colour of the name of "Geo. Condie, Conning & Co." Again, to meet the case of Mr Ballingal being found to have successfully evaded the contract of copartnership, Mr and Mrs Pattison alleged that Mr Ballingal had abused the position of trust in which he was placed, and that through his fraudulent conduct Mr Condie's representatives had sustained loss, for which he was responsible to the amount of at least £5000.

In reply, Mr Ballingal denied all Mrs Pattison's allegations, and explained that after Mr Condie's death he did not "continue to carry on business under the firm of Condie & Ballingal," but entered into an agreement of partnership with Messrs Conning & Hunter, writers, Perth; and that since 1st June 1870 the partnership thus formed had carried on business under the firm of "Geo. Condie, Conning, & Co.," the name of George Condie being used with the assent of his testamentary trustees, and also with the assent of his widow, Mrs Geo. Condie (now Mrs Cross), whose annuity had been continued and might be increased. At the same time, Mr Ballingal stated three preliminary objections to the action. In the first place, Mrs Pattison had no right to sue, because the trustee in Mr Condie's sequestration was the proper legal representative of Mr Condie under Messrs Condie & Ballingal's contract of copartnership. In the second place, assuming her to be the proper representative, her husband and she were not entitled to sue,