Saturday, November 14.

FIRST DIVISION.

[Lord Craighill, Ordinary.

RUSSELL *v.* RUSSELL.

Partnership—Judicial Factor.

When a woman who is a partner in a business marries she drops out of the firm, and the Court will not appoint a judicial factor on the partnership estate. If she wishes to call the remaining partners to account, she must do so by an ordinary action.

Process—Judicial Factor—Special Powers.

Under a petition for the appointment of a judicial factor, the Court will not also grant special powers.

This was a petition at the instance of Mrs Sarah Russell or Russell, wife of Thomas Russel, wine and spirit merchant, 61 Crown Street, Glasgow, with consent and concurrence of the said Thomas Russell, and of the said Thomas Russell for his own right and interest. The following averments were made in the petition: — The late Thomas Russell, father of the petitioner Mrs Russell, carried on business as a wine and spirit merchant at No. 18 Adelphi Street, Glasgow, up to the date of his death, which occurred on 1st March 1866. On 8th November thereafter, his testamentary trustees exposed the goodwill, fittings, and stock of the said business to sale by public auction, and they were purchased by his two daughters, viz., the present petitioner and her sister Margaret Russell. Besides contributing to the said purchase, the two sisters and their brother each paid £120 towards capital, for the purpose of procuring stock and carrying on the business. The said Thomas Russell received charge of the capital, and the business was conducted as formerly at No. 18 Adelphi Street, Glasgow, under the name of Thomas Russell. No written contract of copartnery was executed. The two sisters and their brother lived in family together until shortly before the petitioner's marriage, which took place on 18th December last, 1873. Since her marriage, the petitioner Mrs Russell, by herself and through her agents, repeatedly made application to the said Thomas Russell, respondent, for a statement of his intromissions and division of the profits arising out of the said business, and the parties have had several meetings to endeavour to adjust matters, but latterly Thomas Russell refused either to give the petitioners access to the business-books of the partnership, or to supply them with a statement of accounts. The petitioners thereupon requested that the business should be wound up, and that their interest therein should be paid out; but the said Thomas Russell, respondent, refused to make any payment whatever to the petitioners, either in name of profit arising out of the business, or on account of the petitioner Mrs Russell's share of the goodwill and stock of the copartnery. The petitioners thus had no share whatever in the business since their marriage, and the business was carried on by the respondents without regard to the petitioner's rights and interests. The license and lease of the premises being in the name of Thomas Russell alone, there was danger of his disposing of the same to the prejudice of the petitioner's claim. The prayer of the petitioners was "to sequestrate the estates of the copartnery carried on in the said name of Thomas Russell, wine and spirit merchant, No. 18 Adelphi Street, Glasgow, and to nominate and appoint such person as your Lordships may think fit to be judicial factor on the estates of the said copartnery, with power to him to enter upon the possession, management, and realisation of the said estates, to balance the books and accounts of the said copartnery, to settle the shares and interests of the three partners therein, and generally to wind up the said copartnery, and with the usual powers; the person to be appointed judicial factor finding caution before extract in common form; and to sequestrate, and to appoint a judicial factor as aforesaid *ad interim*." Thomas Russell and Margaret Russell lodged answers, in which they stated that they were willing to hold count and reckoning with the petitioners, and argued that there was no necessity for the appointment of a judicial factor.

The Lord Ordinary granted the prayer of the petition, and appointed a factor "with the powers specially prayed for."

The respondents reclaimed.

At advising—

Lord President—The partnership here was dissolved in 1873 by the marriage of one of the partners. There is no doubt what are the rights of the parties, and if they are not acknowledged they can be given effect to by an ordinary action. Since the dissolution of the partnership the business has been carried on by Thomas Russell and his unmarried sister. The married sister says that she is entitled to have the whole business sold and wound up. But what is asked is that a judicial factor should be appointed who will take charge of the business and oust Thomas Russell and his sister. The effect would be to put an end to the business. Now, this is not a course which the Court can sanction unless under very special circumstances.

The dissolution of a business by the marriage of a female partner has the same effect as if it had been dissolved by the death of a partner. The female partner drops out of the firm just as if she were dead, because she is incapacitated from continuing. She cannot continue in the business without her husband, and she can't bring him into it. The law on this point is well stated in the case of *Young* v. *Collins*, 1 M'Queen. The Second Division thought that there were there specialties which prevented the application of the general rule. The House of Lords affirmed the general rule that when a partnership comes to an end the surviving partners are entitled to carry on the business or to bring it to an end. I am, therefore, clearly of opinion that we should refuse the petition.

It is right to observe that I could not, under any circumstances, have agreed to allow the interlocutor of the Lord Ordinary to stand. It is not our practice to grant special powers under an application for the appointment of a judicial factor. If the factor, after enquiry, comes to be of opinion that special powers are required, he must come and apply to the Court in a separate petition.

Lord Deas—I concur with your Lordship's objection to granting special powers at the time of appointing a judicial factor. The factor ought to have time to look into the matters he is appointed to manage and see if he requires special powers, and then he can make an application to the Court.

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, Recal 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 bequeth 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› this my last will and testament, and for the dis-