whether the petition for *cessio* was presented by the debtor or by his creditors. I therefore think that the interlocutor pronounced by the Sheriff-Substitute upon the 19th June was the proper interlocutor in the circumstances, while that of the 24th June followed as a matter of course. The Sheriff on the other hand seems to have been led into an error through not attending to the provisions of the Act of 1881. I think, therefore, that we should recall the interlocutor of the Sheriff, and affirm the two interlocutors of the Sheriff-Substitute.

Lord Mure concurred.

Lord Shand—In no view of the case does it appear to me to be possible that the Sheriff's interlocutor can be sustained. The provisions of the 9th section are clearly in favour of the rights of creditors, and the Sheriff is authorised to pronounce a decree of *cessio* if he believes that the debtor's failure to appear is wilful. In the present case the bankrupt committed what the Sheriff-Substitute believed to be a wilful default, and he now asks that he is to derive a benefit from this wilful default. The creditors met, and litiscontestation ensued, and I think that they are entitled to keep the proceedings in Court, and that the debtor is not entitled to have his petition dismissed through a failure on his part to comply with the provisions of the statute. I think also that the Sheriff-Substitute was right in his interpretation of section 9 of the Act of 1881, and that in the case of a petitioning debtor citation in the literal sense of the word is not necessary.

The Court recalled the interlocutor of the Sheriff, and affirmed the two interlocutors of the Sheriff-Substitute, and authorised the trustee to pay the appellant's expenses as taxed.

Counsel for Appellant (Marquis of Lothian)—Graham Murray—Baxter. Agent—P. Morison, S.S.C.

Counsel for Respondent (Smith) — Campbell Smith. Agent—David Hunter, S.S.C.

Saturday, November 1.*

FIRST DIVISION.

HOPE *v.* HOPE.

Trust—Removal of Trustee—Judicial Factor—Differences between Trustees.

It is not a relevant ground of application by a trustee for the removal of trustees and the appointment of a judicial factor that the trustees have been for many years at variance as to the management of the estate, and that the management of the estate is at a dead-lock in consequence.

Averments by a trustee in a testamentary trust, which were *held* insufficient to warrant the removal of himself and his co-trustee from office and the appointment of a judicial factor.

This was a petition by James Hope, W.S., for removal of himself and his co-trustee John Hope, W.S., from the office of trustees on the trust-estate of the late Dr Thomas Charles Hope, and for appointment of a judicial factor on the estate.

Dr Hope died in 1844. By his trust-disposition and settlement he left his whole estate, heritable and moveable, to trustees. For more than twenty years before 1884 the petitioner and the respondent, John Hope, had been the only surviving and acting trustees in the trust. Dr Hope, by his settlement, conveyed to the trustees Wardie House, near Edinburgh, and land adjoining it. The trustees were directed to sell the house and ground, and divide the proceeds in manner provided by the trust-disposition for division of the residue of the estate. It was, however, declared that the house and grounds should not be sold so long as the truster's five nieces, or any two of them, should be alive and unmarried, or in widowhood, and should desire to reside there. The division of residue was to be equally among the seven nephews and nieces of the truster who were named in the settlement.

The averments on which the petition was presented were—That there had been from time to time interim divisions of the estate, by which much the greater part of it had been divided, but there still remained Wardie Lodge, and certain sums of money; "that for very many years past the petitioner and his co-trustee, the said John Hope, have been unable to agree upon the management of the said trust-estate, and in consequence thereof the trust has for some considerable time been at a dead-lock, and as the trust-estate is suffering through the differences between the petitioner and his co-trustee it is necessary and proper that a judicial factor should be appointed to manage the said estate and carry out the purposes of the trust so far as remaining unfulfilled."

John Hope lodged answers. He denied the material averments of the petitioner, stating that there was only one matter on which a difficulty had existed (as to a payment of £350 to each beneficiary); that the existing trust management was simple and inexpensive; and that the appointment of a judicial factor would be expensive and wholly unnecessary.

After hearing counsel on the petition and answers, the Court allowed the petitioner to amend the petition by averring more specifically the differences that existed between the trustees.

The petitioner then stated—(1) That for a long period there had been no law-agent in the trust, though the deed contemplated that one should be appointed, and the petitioner had frequently urged such an appointment. (2) That a sum of bank stock had been some years before set free for distribution, and he had urged the distribution of it; that he had done so in 1877, but the respondent had disregarded his representations; that the stock was then selling at £232 per cent., but in consequence of the respondent's attitude it had been held till 1881, when it could only be sold at £203, and serious loss was thus caused; that the price had never been distributed, because the respondent insisted on the beneficiaries giving formal discharges instead of mere receipts, which was quite unnecessary. (3) That though only a few matters remained undisposed of in the trust, it had become unworkable owing to the obstruction and often unreasonable action of the respondent, who did not answer the petitioner's letters, and refused to furnish a state of the trust affairs. (4) That diverse opinion, and hence inaction, existed

* Decided 18th October.

as to Wardie Lodge; that the petitioner held that the time had come for selling it, as only one of the truster's nieces lived there, and the others had determined not to do so. (5) That a certain road used before 1846 as an approach to Wardie Lodge had been disused since then for that purpose, but had been used by conterminous proprietors, who had asserted a servitude over it; that the period of prescription for this servitude would soon have run, and the petitioner was apprehensive that the truster's right over the road would be lost, and the respondent had refused to concur in any step to check the running of prescription. (6) That the petitioner was convinced from the experience of twenty years, and from his present relations with the respondent, that the trust could not be worked, and that a judicial factor would best serve the interests of the beneficiaries.

Of the five beneficiaries other than the petitioner and respondent, two desired that a factor be appointed, two maintained a neutral position, and one was averse to the appointment.

Counsel were again heard on the petition as amended.

Authorities cited at debate—Thoms on Factors (Fraser's edition), p. 27; *Thomson* v. *Dalrymple*, 3 Macph. 336; *Taylor*, 18 D. 1097; *Halcomb*, 15 D. 861 (Lord Ivory's opinion); *Forbes*, 14 D. 498; *Drummond*, 19 D. 859 (Lord Colonsay's opinion); *Adie*, 14 S. 185; *Laird*, 12 S. 187.

At advising—

Lord President—If it were sufficient reason for the removal of trustees that they do not get on very comfortably together, then we should have sufficient grounds for removing them here. But if we did so we should not be following the rules and practice of this Court in such questions. It is not sufficient for trustees to come to the Court and say, "We cannot get on together, so we wish to be removed, and to have the estate put under a factor." We sometimes see somewhat parallel cases in partnerships, where the parties who have contracted together for a number of years come to the Court and ask that the partnership should be dissolved. The answer to them is, "Why did you enter into such a partnership without duly considering whether you would get on well together?" and the answer is just the same in the case of trustees. If the petitioner had shown that the respondent had obstructed the administration of the trust, and had acted against the express wish of the truster, the question would have been very different, but I think nothing of that kind can be said here. Mr Dundas was able on one or two occasions to make a plausible statement as to the sale of Wardie as if that were a step which fell now to be taken as a matter of course, but it seems to me to be by no means certain that it is so; on the contrary, it is matter of doubt whether the time for selling it has arrived, and we certainly cannot settle that question under this petition. The other ground stated is simply that the trustees do not get on well together, and I do not think that a sufficient ground. I am of opinion that we should refuse the petition.

Lord Mure and Lord Shand concurred.

The Court refused the petition, finding no expenses due.

Counsel for Petitioner — Graham Murray — Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Respondent—Mackintosh—Pearson. Agent—John Hope, W.S.

REGISTRATION APPEAL COURT.

(Before Lord Mure, Lord Craighill, and Lord Fraser).

Monday, November 3.

[Sheriff-Substitute of the Lothians.

JOHNSTON *v.* GUILD.

Election Law—Burgh Franchise—Occupancy—Pig-stye—Reform Act 1832 (2 *and* 3 *Will. IV. cap.* 65) *sec.* 11.

Held that, assuming a pig-stye to be a "building" within the meaning of sec. 11 of the Reform Act of 1832, there had not been sufficient occupancy to satisfy the provisions of the section and confer a qualification.

At a Registration Court for the burgh of North Berwick held on 8th October 1884, Thomas Johnston objected to the name of James Lyon Guild, tenant of the farm called The Abbey, near North Berwick, being retained on the roll.

Guild's alleged qualification was part of his farm which was within the boundary of the burgh, on which he had erected a wooden pig-stye, and the objection was that the pig-stye was not such a building as taken along with lands entitled the owner or occupant to be entered on the register under section 11 of 2 and 3 Will. IV. cap. 65.

The Sheriff-Substitute (Shirreff) repelled the objection.

The objector took a Case.

The facts stated were—"The Sheriff-Substitute inspected the pig-stye in question. It is situated at some distance from the farm-steading, and detached from any other building, and within thirty yards of a dwelling-house on an adjoining property. It is a substantial erection. It appears to have been constructed by driving strong wooden posts firmly into the ground; to these posts wooden boards are securely nailed, forming the sides of a small house and court, the house and court being each four or five feet square. The roof of the house is also of substantial boards. The house could not have been lifted up and carried away unless by a considerable number of men."

"It was admitted that the pig-stye had been on the ground in Mr Guild's occupation for a year prior to 31st July last, but he had only kept a pig in it for about a fortnight."

The questions for the opinion of the Court were—"(1) Whether the wooden pig-stye in question is a 'building' within the meaning of the statute 2 and 3 Will. IV. cap. 65?; and (2) Whether there had been sufficient occupation of said pig-stye to satisfy the provisions of the said section of the statute?"

Argued for the appellant—The pig-stye was not a "building" *ejusdem generis* with those enumerated in sec. 11 of the Reform Act. A burgh qualification was not territorial, but must