prepared to say that it is clear that the mere lapse of four years destroyed the defender's right to offer to adhere, and it is not necessary to come to any conclusion on that matter here.

I think it right, however, to say that I concur in the observations which your Lordship has made on the two cases which contain the *dicta* of the Lord Justice-Clerk.

The Court adhered.

Counsel for Pursuer — Ferguson. Agent—Thomas S. Esson, W.S.

Friday, October 31.

FIRST DIVISION.

SPECIAL CASE—THE GOVERNORS OF GEORGE HERIOT'S HOSPITAL AND OTHERS.

Superior and Vassal—Relief—Heir of Investiture—Duly Entered.

The destination in a disposition and settlement made by C was "to the heirs-male of my body, whom failing to the heirs-female of my body, whom failing to G, my cousin-german, and the heirs whomsoever of his body, whom failing to my own nearest heirs whomsoever." G succeeded, and made up his title by decree of general service and charter of resignation, which contained the above destination, omitting the words "whom failing to my own nearest heirs whomsoever." On his entry he paid a composition to the superior. In 1881 G died intestate and without issue, and the sisters of C completed a title to the lands by decree of special service as "nearest lawful heirs-portioners of provision in special of G . . . under and by virtue of the foresaid disposition and settlement of C and titles following thereon." A Special Case was presented to decide whether the superior was entitled to a composition or only to relief-duty, in which the superior admitted that the vassals were duly entered. *Held* that as the vassals were admittedly entered as heirs of investiture no composition was due.

By disposition and settlement, dated 5th November 1851, and registered in the Books of Council and Session 23d June 1856, the late Thomas Carnegy, Esquire of Craigo, gave, granted, disponed, and assigned "to the heirs-male of my body, whom failing to the heirs-female of my body, whom failing to Thomas Macpherson Grant, Writer to the Signet, my cousin-german, and the heirs whomsoever of his body, whom failing to my own nearest heirs whomsoever," *inter alia*, "All and Whole the lands and estate of Nicolson Park" and others belonging to him, situated at St Leonards, Edinburgh.

Mr Carnegy died on or about 12th June 1856, without leaving heirs-male or female of his body, and without altering the said destination, and Thomas Macpherson Grant succeeded to the lands of Nicolson Park under the foresaid destination. He made up his title to the portion of the said lands which was held of the Governors of George Heriot's Hospital by decree of general service "as nearest and lawful heir of provision in general of the said late Thomas Carnegy under the foresaid disposition and settlement," recorded in Chancery on 12th November 1856, and by charter of resignation by the said superiors in his favour, dated 4th December 1856. By said charter of resignation the Governors of Heriot's Hospital gave, granted, disponed, and in feu-farm forever confirmed to and in favour of "Thomas Macpherson Grant, Esquire, Writer to the Signet, and the heirs whomsoever of his body," the portion of the said lands of Nicolson Park, of which they were superiors. The charter bore that the said subjects pertained heritably of before to the deceased Thomas Carnegy, and had been resigned into the hands of the said superiors by virtue of the procuratory of resignation contained in the foresaid disposition and settlement, "in favour and for new infeftment of the same, to be made, given, and granted to the heirs-male of the body of the said deceased Thomas Carnegy, whom failing to the heirs-female of his body, whom failing to the said Thomas Macpherson Grant, his cousin-german, and the heirs whomsoever of his body: To which disposition and settlement and procuratory of resignation therein contained the said Thomas Macpherson Grant has right, either by virtue of the death of the said Thomas Carnegy without heirs, male or female, of his body," or of the foresaid decree of general service in his favour. By instrument of sasine following on this charter recorded on 16th December 1856, Mr Macpherson Grant was infeft in the said subjects. The entry of heirs was by the said charter taxed at a duplicand of the feu-duty, which was 5s. 4½d. per annum, and the entry of singular successors was untaxed. Mr Macpherson Grant paid to the superiors on his entry as a singular successor to Mr Carnegy a composition of £277, 9s. 5d., being a year's rental (consisting of sub-feu-duties), under deduction of the year's feu-duty and burdens. Mr Macpherson Grant died on 23d September 1881, intestate and without issue, and the four surviving sisters of Thomas Carnegy succeeded to the said subjects.

This was a Special Case presented by the Governors of Heriot's Hospital of the first part, and the Misses Carnegy of the second part, for the opinion of the Court upon the following question:—"Are the first parties entitled to a casualty of one year's rent, or of relief-duty only, in respect of the implied entry of the second parties and their said sister?"

The Special Case contained this statement—"The second parties [and their sister Miss Bain, who died before the date of this case] being then the only surviving sisters of the said Thomas Carnegy, and the only surviving issue of the late David Carnegy of Craigo, his and their father, succeeded to the said subjects under the destination in the before-mentioned disposition and settlement by the said Thomas Carnegy. They completed their title by decree of special service as 'the nearest lawful heirs-portioners of provision in special of the said deceased Thomas Macpherson Grant, . . . under and by virtue of the foresaid disposition and settlement of the said Thomas Carnegy, and titles following thereon.' The decr[illegible] of special service

was recorded in the register of sasines on 14th August 1882, and the second parties and their said sister were thus *duly* entered with the first parties as their immediate superiors."

Argued for the first parties—If the second parties were not heirs of the existing investiture or of the last entered vassal, they must pay a composition. There was here a clearly interposed investiture between Thomas Carnegy and the second parties. The superior was not concerned to inquire whether they had a right or not—Bell's Prin., sec. 717; Duff's Feudal Conveyancing, 331; Menzies' Conveyancing, 815; *Molle* v. *Riddell*, Dec. 13, 1811, F.C.

Argued for the second parties—The question was whether the enfranchisement of the destination depended solely on the terms of the charter granted by the superior or on the antecedent procuratory also. It was here admitted that the second parties were *duly* entered as heirs of provision. Moreover, it was only as heirs of provision that they could take, because (1) the superior was bound to recognise the whole destination, or not recognise it at all, and (2) having accepted the resignation under the procuratory he was bound to carry it out completely or not at all—*Drummond* v. *Drummond*, M. 6934, *aff.* 3 Pat. 557; *Lockhart* v. *Denham*, M. 15,047, 11 Ross' L. C. 327; *Stirling* v. *Ewart*, February 14, 1842, 4 D. 684, *aff.* 3 Bell's App. 128, 11 Ross' L. C. 40; *Advocate-General* v. *Swinton*, November 14, 1854, 17 D. 21; Bell on Titles, 2nd ed., 258; Menzies on Conveyancing, pp. 597-9.

At advising—

Lord President—The first parties to this Special Case are the Governors of Heriot's Hospital, who are superiors of the lands and estate of Nicolson Park, and the second parties are the sisters and heirs-at-law of the late Thomas Carnegy of Craigo, who was the vassal in these lands under the Governors of Heriot's Hospital, and died on 12th June 1856. Mr Carnegy left a settlement by which he disponed the lands to "heirs-male of my body, whom failing to the heirs-female of my body, whom failing to Thomas Macpherson Grant, Writer to the Signet, my cousin-german, and the heirs whomsoever of his body, whom failing to my own nearest heirs whomsoever." The testator died without issue of his body, and Thomas Macpherson Grant then became entitled to take up the succession. He entered with the superiors by charter of resignation, in which the lands were conveyed in these terms—"in favour of Thomas Macpherson Grant, Esq., Writer to the Signet, and the heirs whomsoever of his body." There the conveyance stops, and thus did not exhaust the destination in the trust-disposition and settlement of Carnegy of Craigo. Then Mr Macpherson Grant died without issue, and on that event questions of considerable difficulty might have arisen. In the first place, whether the Misses Carnegy, the sisters of Carnegy of Craigo, were entitled to succeed at all, for a competition might have arisen between the heir-at-law of Thomas Macpherson Grant and them; again, as to the character in which they would take, whether as heirs of provision under the settlement or as heirs-at-law, that is to say, as heirs whatsoever; again, whether they were entitled under the settlement at all. But none of these questions have been propounded, and the only question asked is this—"Are the first parties entitled to a casualty of one year's rent, or of relief-duty only, in respect of the implied entry of the second parties and their said sister?" Now, that question we have taken means of answering on the facts stated, without entering on any of the points which I have indicated. These ladies are infeft, and therefore impliedly entered with the superiors, and the question is, whether the terms of the infeftment and implied entry entitle the superiors to a composition or only to a casualty of relief? This question might have been raised in a different form if the superiors had brought a statutory action under the Act of 1874, in which case they would not have been under an obligation to take any notice of the infeftment if they were not to recognise it as good—as constituting an implied entry. The form which is given in the schedule only requires that the action shall conclude for declarator, "that in consequence of the death of C., who was the vassal last vest and seised in All and Whole the lands of X . . . a casualty, being one year's rent of the lands, became due to the said A as superior of the said lands upon . . . . the date of the death of the said C," or upon the date of the infeftment, either the one or the other. If the superiors had brought an action in that form, stating that a casualty was due in consequence of the death of Mr Macpherson Grant, and concluding for payment against these ladies, then they might have raised a question involving the consideration of those other matters I have mentioned. It is not necessary that the party against whom such an action is brought should be infeft: it is directed against the party in possession, and if he has entered into possession in a wrong character, then the superior is entitled to ignore that. Instead of doing that, however, the superiors here enter into the adjustment of a Special Case with the second parties, in which they concur with them in making this statement—"Mr Macpherson Grant died on 23d September 1881 intestate and without issue, and the second parties, and the said Mrs Agnes Carnegy or Bain, being then the only surviving sisters of the said Thomas Carnegy, and the only surviving issue of the late David Carnegy of Craigo, his and their father, succeeded to the said subjects under the destination in the before-mentioned disposition and settlement by the said Thomas Carnegy." That settles one point. They completed their title by decree of special service as "the nearest lawful heirs-portioners of provision in special of the said deceased Thomas Macpherson Grant, . . . under and by virtue of the foresaid disposition and settlement of the said Thomas Carnegy, and titles following thereon"—that is to say, the charter of resignation and infeftment in favour of Thomas Macpherson Grant. Then they say further:—"The decree of special service was recorded in the register of sasines on 14th August 1882, and the second parties and their said sister were thus *duly* entered with the first parties as their immediate superiors"—that is to say, they recognise as completely valid and effectual the sasine in favour of the second parties, not merely as a sasine but also as constituting an implied entry. They are therefore entered with the superiors as heirs of provision—that is to say, as heirs of investiture under the charter of resignation.

In that case there is only one answer which can be given to the question put, viz., that no composition is due on the entry of an heir of investiture.

LORD MURE—The difficulty here turns on the omission in the charter of resignation of certain words which occur in the procuratory on which the charter proceeds. The words omitted are, "whom failing to my own nearest heirs whomsoever," and occur in the disposition and settlement of 1851 immediately after the conveyance to Thomas Macpherson Grant. When the charter of resignation was expede these words were not added; if there had been added the words, "whom failing to my own nearest heirs whomsoever," there could have been no question as to the character in which the second parties would claim the property under Mr Carnegy's settlement.

The question now is, whether they are singular successors or heirs of provision, and had the matter been brought in the shape your Lordship suggested, there might have been nice questions. But on the facts here I think there can be no difficulty in answering the question which is above put, viz., "Are the first parties entitled to a casualty of one year's rent, or of relief-duty only, in respect of the implied entry of the second parties and their said sister?" What was that implied entry as stated in the Case? It is admitted that they completed their title by decree of special service as "the nearest lawful heir-portioners of provision in special of the said deceased Thomas Macpherson Grant. . . . under and by virtue of the foresaid disposition and settlement of the said Thomas Carnegie." That, I think, is not a case for the payment of a composition.

LORD SHAND — I am of the same opinion. The charter of resignation in favour of Thomas Macpherson Grant bears that he is entered under the destination in the settlement of the late Thomas Carnegy, and the parties here are agreed that these ladies succeeded under that destination, for that is put as a statement in the Case. I think therefore that we are only following the decision in several cases, of which *Stirling* v. *Ewart* is one, in holding that as a result of this enfranchisement of the destination the superior must take a relief-duty when an heir succeeds. The branch of the destination is not mentioned in the charter of resignation, but I do not think that will give the superior right to a composition. When the fact of the enfranchisement is conceded, then these ladies take under the same destination as Mr Thomas Macpherson Grant.

LORD DEAS was absent.

The Court pronounced this interlocutor—

"Find and declare that the first parties are not entitled to a composition of one year's rent, but to relief-duty only, in respect of the implied entry of the second parties and their sister, and decern; and find the second parties entitled to expenses, and remit," &c.

Counsel for First Parties—Gloag—Lorimer. Agent—John Tawse, W.S.

Counsel for Second Parties — Mackay — H. Johnston. Agents — Lindsay, Howe, & Co., W.S.

Saturday, November 1.

FIRST DIVISION.

[Sheriff of Roxburghshire.

MARQUIS OF LOTHIAN *v.* SMITH.

Process—Cessio bonorum, *Petition for at Debtor's Instance—Default—The Bankruptcy and Cessio (Scotland) Act* 1881 (44 *and* 45 *Vict. cap.* 22), *sec.* 9—*The Debtors (Scotland) Act* 1880 (43 *and* 44 *Vict. cap.* 34), *sec.* 9, *sub-sec.* 6.

A debtor who had presented a petition for the benefit of *cessio bonorum* failed to appear on the day fixed for his examination, and the Sheriff found that the failure was wilful, and, on the motion of the creditors, granted decree of *cessio* in his absence. *Held* that the order for the debtor to appear for examination, pronounced on his own petition, was equivalent to a citation so to appear in the sense of section 9 of the Bankruptcy and Cessio Act 1881, and therefore that decree of *cessio* had been rightly pronounced.

The Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), section 9, provides—"If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may, in the debtor's absence, pronounce decree of *cessio bonorum*."

The Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), section 9, sub-section 6, provides—"The expense of obtaining the decree [appointing a debtor to execute a disposition *omnium bonorum*], and of the disposition *omnium bonorum*, shall be paid out of the readiest of the funds thereby conveyed."

Thomas Smith, coal merchant, Jedburgh, presented a petition for *cessio bonorum* in the Sheriff Court of Roxburghshire on 23d May 1884, praying the Court to find that he was notour bankrupt, that he was unable to pay his debts, that he was ready to surrender his whole means and estate for behoof of his creditors, and that his inability to pay his debts had arisen solely from his misfortunes and losses. He submitted a list of his creditors. Among the creditors was the Marquis of Lothian, whose agent had upon the 17th of May 1884 intimated to Smith that unless a debt of £95, 14s. 7d. due by him, and for which the Marquis of Lothian held decree which had been followed by a charge and poinding, was paid, a petition for *cessio* against him would be forthwith presented.

Upon the 23d May 1884 the Sheriff-Substitute pronounced the usual first deliverance, appointing the petitioner to publish a notice of his petition in the *Edinburgh Gazette*, to make special intimation to his creditors, and requiring him and his creditors to appear on 19th June as the day fixed for the petitioner's public examination, and the petitioner to lodge six days previous thereto a state of his affairs.

The petitioner failed to appear upon 19th June, the day appointed by the previous interlocutor, and the Sheriff-Substitute pronounced this interlocutor:—"The debtor having failed to appear in obedience to the order of Court, dated 23d May last, and the Sheriff being satisfied that such