some reason for hesitation, but there is no successful attempt to show this. We have nothing to do here with the political economy of the matter, but if we had, I should be quite able to sympathise with the magistrates, who are merely desirous of bringing within the area of assessment all persons whom the law permits them so to bring. This is a tax requiring that those who get the benefit of common services supplied to the inhabitants of the burgh should pay the cost price for them. The burgh assessment is for lighting, cleaning, watching, &c.; all these commodities have to be paid for, and all receiving them must *prima facie* pay the cost price on them, for if they do not, then the burden falls on the rest of the ratepayers. This is only my own view on this point, and I only refer to it to explain my sympathy with the magistrates, who I say not unreasonably seek to bring within the area of assessment all persons permitted by law to be so brought. The Legislature, however, has thought otherwise, and has made exemption in the case of buildings solely occupied for purposes of public charity. This hospital is of this character in my view, and therefore is exempt from the otherwise exigible police rates.

Lord Craighill concurred.

The Court recalled the interlocutor of the Lord Ordinary, and found and declared in terms of the conclusions of the summons.

Counsel for Reclaimers—D.F. Kinnear, Q.C. — Thorburn. Agents — Morton, Neilson, & Smart, W.S.

Counsel for Respondents — Mackay. Agent—W. White Millar, S.S.C.

Wednesday, March 2.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—BROWN AND OTHERS, PETITIONERS.

Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79)—*Trustee Discharged—New Trustee Appointed to Fulfil an Obligation of Bankrupt.*

Where the trustee in a sequestration had been discharged, and the bankrupt had died undischarged, the Court, on the petition of the former trustee and two creditors, remitted to the Lord Ordinary on the Bills to appoint a meeting of creditors to be held for the election of a new trustee, in order that he might concur in granting a title to property which the bankrupt had sold, but of which the titles turned out to be defective.

The late John Buchanan, merchant in Glasgow, was a partner of the firm of Grasemann & Company, merchants in British Burmah, of which firm he latterly was the sole partner. In 1859 Grasemann & Company purchased certain land and premises at Poozoondoung, Rangoon, on which they erected rice mills. The firm became unsuccessful. It stopped business, and was wound up as an insolvent concern at Rangoon in the end of 1867. The heritable properties above mentioned were exposed to sale by public auction by and for behoof of the creditors of the company, and were purchased by Mr Thomas Matthew, merchant, Glasgow, at the price of about £20,000; Mr Matthew also took over what remained of Grasemann & Company's business, and carried it on in partnership with Mr Buchanan, under the firm of Matthew, Buchanan, & Company of Glasgow, and Buchanan & Company of Rangoon. Mr Buchanan's interest in the new concern was merely nominal.

Grasemann & Company had received advances from the City of Glasgow Bank, and were also indebted to Mr John Hunter, merchant, Glasgow. The money with which Mr Matthew paid for the above properties was also borrowed from the City of Glasgow Bank; and it was resolved to take the title in the joint names of Mr Matthew and Mr Hunter, so as to afford some security to Mr Hunter and to the bank. In order to carry out this intention, Mr Buchanan, in whom the title to said properties was vested as sole surviving partner of Grasemann & Company, with Mr Matthew and Mr Hunter, executed a power of attorney in favour of Mr Alexander Hotson, Buchanan & Company's representative at Rangoon, in which it was recited that it had been determined that the above subjects should be transferred to and registered in the names of Mr Matthew and Mr Hunter till further instructions; and power was given Mr Hotson to take whatever steps might be necessary for completing Mr Matthew's and Mr Hunter's title; but acting on letters from Mr Matthew and Mr Buchanan he in April 1868 executed a conveyance to Mr Matthew alone.

In 1873 Mr Buchanan retired from partnership with Mr Matthew. On 30th April 1874 his estates were sequestrated by the Sheriff of Lanarkshire, and on 15th May 1874 William Brown was duly confirmed trustee thereon. The trustee realised the estates so far as known at the time, and divided the whole free realised funds in common form. The funds were insufficient to pay the creditors in full. The trustee was thereafter, on 16th December 1875, duly discharged by the Sheriff of Lanarkshire. Mr Buchanan died on 8th January 1875 without being discharged.

On 18th November 1878 the firms of Matthew, Buchanan, & Company and Buchanan & Company were adjudicated bankrupts by the London Bankruptcy Court, and Mr William Hurlbatt, accountant, of 8 Old Jewry, London, was appointed trustee thereon. He sold the Rangoon properties, which formed part of the bankrupt estate, but difficulties arose regarding the title to be given to the purchaser owing to the directions contained in the power of attorney above mentioned to convey the properties to Mr Matthew and Mr Hunter not having been duly observed, but the conveyance taken to Mr Matthew alone. It had become impossible, on account of Mr Hunter's death, to obtain his concurrence in a new conveyance, and in consequence of Mr Buchanan's death and his trustee's discharge it was also impossible to obtain any consent on his part thereto. The sole persons interested in the estates of Matthew, Buchanan, & Company and Buchanan & Company were their creditors the City of Glasgow Bank and liquidators, and they were advised by their solicitors in Rangoon that

a good title might be given by having a new conveyance granted by Mr Matthew's trustee, Mr Hunter's executor, and Mr Buchanan's trustee. In these circumstances the former trustee in Mr Buchanan's sequestration, together with two of his creditors, petitioned the Court "to remit to the Lord Ordinary on the Bills to appoint a meeting of the creditors of the said John Buchanan, to be held at such a time and place as his Lordship may fix, to elect a trustee or trustees in succession, and commissioners, on the said sequestrated estate; and to appoint the said meeting to be advertised in the *Edinburgh Gazette;* and to remit to the Sheriff of the county of Lanark to proceed in the said sequestration in terms of the statute."

The Court, taking up the petition in the Single Bills, granted its prayer.

Counsel for Petitioners—Lorimer. Agents—Davidson & Syme, W.S.

HOUSE OF LORDS.

Monday, March 7.

(Before the Lord Chancellor (Selborne), Lords Blackburn and Watson.)

DICK & STEVENSON *v.* MACKAY.

(*Ante*, May 21, 1880, vol. xvii. p. 565, 7 R. 778.)

Contract—Condition Precedent—When Implement of Condition Prevented by the Fault of the Debtor in the Obligation.

Application (in affirmation of a judgment of the Court of Session) of the doctrine *Pro impleta habetur conditio cum per eum stat, qui, si impleta esset, debiturus esset.*

Judicature Act 1825 (6 *Geo. IV. c.* 20), *sec.* 40—*Process — Appeal — Finality of Judgment of Court of Session on Matters of Fact — Remit to Court below.*

In appeals falling within the 40th section of the Judicature Act no remit will be made to the Court of Session to pronounce findings as to matters of fact unless the record has distinctly raised questions relative thereto, and it can be shown from the record that the Court of Session has not exhausted the issue before it, the House of Lords having no concern with the proof led in the Sheriff Court.

This was an appeal taken by the defender against the judgment of the Court of Session, reported *ante*, May 21, 1880, 7 R. 778. The First Division of the Court had pronounced this interlocutor—"Recal the interlocutor of the Sheriff of date 2d December 1879: Find that the pursuers undertook to supply, and the defender undertook to purchase and pay £1115 for, a steam digging machine, in terms of letters dated respectively 21st and 22d September 1876: Find that it was a condition of the said contract that the defender should not be bound to accept and pay for the said machine if it should fall short of digging and filling into waggons 350 cubic yards of the clay or other soft substance, within a day of ten hours, in a certain railway cutting which the defender had to make, called the Carfin cutting, after it was fairly tried on a properly opened-up face: Find that it was impossible that the machine should have the stipulated fair trial unless the defender provided a properly opened-up face at the said Carfin cutting: Find that the defender failed to provide such properly opened-up face, notwithstanding repeated demands on the part of the pursuers, and thus prevented the machine from being tested in the manner provided by the contract: Find that the defender has failed to prove that the pursuers agreed to substitute for the Carfin cutting any other cutting as the place for the trial of the said machine." The Court therefore decerned against the defender for the sum sued for.

In support of his appeal the defender urged, as in the Court of Session, that the Garriongill cutting had by agreement of parties, as appearing on their correspondence, been substituted for the Carfin cutting. In addition he maintained, that although the test provided in the contract had not been applied, it appeared from the evidence led in the Sheriff Court that sufficient trial had been otherwise taken of the machine to show that it was disconform to contract, and therefore might justly be rejected, and asked the House to remit to the Court of Session that they might pronounce findings on this new contention.

At delivering judgment—

Lord Blackburn—My Lords, this is an appeal against an interlocutor of the First Division of the Court of Session pronounced in reviewing the judgment of the Sheriff Court of Lanarkshire, proceeding on proof taken on a record made up in the Sheriff Court.

The Court of Session in reviewing the judgment had full power to find the facts on the proof, and to determine the law also; but the Legislature have, by the Judicature Act of Scotland (6 Geo. IV. chap. 120, sec. 40), provided that "When in causes commenced in any of the Courts of the Sheriff, ... or other Courts, matters of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of facts so found or on matter of law; and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matters of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor."

The old rules of pleading in force in England at that time were founded on the strictest logic, often carried to an extreme which, when the pleadings were not managed by very skilful hands, worked injustice, but always founded on a principle; and those which regulated special verdicts, to which the Legislature here refers, were no exception. They are very accurately