to his Substitute's judgment, was not pronounced till 9th April, and was not promulgated, as it is called, till the 18th of April. That, therefore, must be held to be the date of the interlocutor allowing proof—it is the footing most favourable to the appellant, but it is also the substantially just one. Now, no appeal was taken until the 19th of July. But by the Act of Sederunt it is indispensable that a bill of advocation (which was the old form of procedure) should be intimated in the Inferior Court within fifteen days of the interlocutor allowing proof. The explanation is here made that the value of the cause does not appear on the face of the record, and it was therefore necessary to present a special appeal to the Sheriff, and the deliverance of the Sheriff on that application was not pronounced till 6th July. Whatever was the cause of delay, I think it is impossible to sustain this appeal in face of the terms of the Act of Sederunt, especially in the view of previous decisions on the subject. We have the case of *Falconer* v. *Sheills & Co.* (July 10, 1827, 5 S. 910), and the very recent case of *Fleming* v. *Kinnes* (Jan. 15, 1881, 18 Scot. Law Rep. 245), which occurred in this Division of the Court during last session. I think it was obviously contemplated that the whole proceedings necessary to enable a party to appeal, if the value of the cause does not appear on the face of the record, must be gone through within fifteen days from the date of the interlocutor allowing proof, otherwise it is imperative on the Sheriff to proceed with the proof so ordered. I think it is impossible to sustain this appeal. This is not really a section excluding review, in the proper sense of the words; I should be unwilling so to construe the Act of Sederunt. I think there is a privilege given by section 40 of the Judicature Act to a pursuer to have his case tried by a jury instead of in the ordinary way, but he must comply with all the conditions imposed upon his privilege, or else submit to go to proof.

Lord Deas—If I had been disposing of this objection by myself I should have been inclined to say that as the presumption is always in favour of the jurisdiction of this Court, the Act of Sederunt is not so clear in the direction indicated by your Lordship as to exclude the competency of this appeal. But at the same time, as your Lordship has pronounced an opposite opinion, I am not prepared to dissent.

Lord Mure concurred with the Lord President.

Lord Shand—There can be no doubt that if the value appear on the face of the record an appeal against an allowance of proof must be taken within fifteen days, and if these delays elapse first it is incompetent to appeal. But the appellant's argument would involve this, that where the value does not so appear, delays of an indefinite kind might occur, and yet there might remain a power to appeal as to procedure. I do not so read the Act of Sederunt. As I read it, if a party wishes to appeal against an interlocutor allowing proof, he must, whether the value of the cause appears *ex facie* of the record or not, appeal within fifteen days from the date of such allowance. The Act provides a summary mode of ascertaining the value of the cause where it does not appear, and all that is necessary may be readily done within fifteen days. I have no hesitation in concurring in the view that the appeal is incompetent.

The Lords dismissed the appeal as incompetent.

Counsel for Appellant — R. V. Campbell. Agents—Maitland & Lyon, W.S.
Counsel for Respondent—Trayner. Agent—Alexander Morison, S.S.C.

Tuesday, October 25.

SECOND DIVISION.

[Lord Fraser, Ordinary.

FERRIER *v.* SCHOOL BOARD OF NEW MONKLAND.

(Before the Lord Justice-Clerk, Lords Young and Adam.)

Poor—Assessment—8 and 9 Vict. cap. 83, sec. 33 (Poor Law Amendment Act 1845)—35 and 36 Vict. cap. 62, sec. 69 (Education Act 1872.)

Held that parochial boards are entitled, under the Poor Law Amendment Act of 1845, to impose an assessment to meet the provisions of the Education Act of 1872 as to the elementary education of children whose parents are unable from poverty to pay fees therefor.

By the Poor Law Amendment Act of 1845 (8 and 9 Vict. cap. 83), sec. 33, it is enacted—"That it shall be lawful for the parochial board of any parish or combination assembled at such meeting, or at any adjournment thereof, or for the parochial board of any parish or combination, at any meeting of such board called for that purpose, and of which due notice shall have been given by letter, advertisement, or otherwise, to all the persons entitled to attend, to resolve that the funds requisite for the relief of the poor persons entitled to relief from the parish or combination, including the expenses connected with the management and administration thereof, shall be raised by assessment, and if the majority of such meeting shall resolve that the funds shall be raised by assessment, such resolution shall be final, and shall be forthwith reported to the Board of Supervision, and it shall not be lawful to alter or depart from such resolution without the consent and authority of the Board of Supervision previously had and obtained." Sections 34 and 35 of the said Act set forth the modes in which the said assessment may be made.

By the 69th section of the Education (Scotland) Act 1872 it is provided that "It shall be the duty of every parent to provide elementary education in reading, writing, and arithmetic for his children between five and thirteen years of age, and if unable from poverty to pay therefor, to apply to the parochial board of the parish or burgh in which he resides, and it shall be the duty of the said board to pay out of the poor fund the ordinary and reasonable fees for the elementary education of every such child, or such

part of such fees as the parent shall be unable to pay, in the event of such board being satisfied of the inability of the parent to pay such fees."

By the 22d section of the Education (Scotland) Act 1878 it is provided that "If a parent is unable from poverty to pay for the elementary education in reading, writing, and arithmetic of his child or children between five and thirteen years of age, and if, upon application, the parochial board of the parish or burgh in which he resides refuses to pay out of the poor fund the ordinary and reasonable fees of such child or children, it shall be the duty of the School Board to apply to the Sheriff, who, after inquiry, may, if he shall think fit, grant an order on such parochial board to pay the said fees, and such order may dispose of all question of expense."

Under the foresaid provisions of the Education Acts various claims were made by the School Board of the parish of New Monkland on Andrew Ferrier, the inspector of poor in that parish, for behoof of and as representing the parochial board of the said parish, for the payment of fees for the elementary education of children of poor persons not legally entitled to parochial relief. These claims he resisted on the ground that the Act of 1845 gave him no power to assess for the purposes of the Acts of 1872 and 1878; and finally he raised this action against the School Board of the parish for the purpose of having it declared that they had no right under the Acts of 1872 and 1878, either by themselves or by means of an order from the Sheriff, in terms of the provisions of the last-mentioned Act or otherwise, to ask or demand that payment should be made by the pursuer, as inspector foresaid, from the assessment made under the Act of 1845, of any school fees or any part thereof for the elementary education of any child or children whose parent or parents were not legally entitled to parochial relief.

He pleaded that he "was not entitled or bound to make payment from the poor-rates to the defenders for the school fees of the children of any persons except those who were legally entitled to parochial relief."

The defenders, on the other hand, pleaded—"(2) The construction sought to be put by the pursuer on the statutes libelled being erroneous, the defenders are entitled to absolvitor, with expenses. (4) The parochial board, in fixing the amount of the assessment for relief of the poor, are entitled and bound to provide funds sufficient to pay the said fees, and are entitled and bound to pay the same out of the poor fund, whether raised by assessment or otherwise."

The Lord Ordinary (FRASER) sustained the fourth plea stated for the defenders, and therefore assoilzied the defenders from the action, and decerned.

He added the following note:— . . . To give effect to the conclusion "that the parochial board has not received powers from the Legislature to impose an assessment for this new purpose to which the poor's funds are to be applied would be to entirely defeat the provision in the Education Act. No doubt that Act is defective in this respect, that while declaring it to be the duty of the parochial board to pay from the poor funds the fees of children whose parents are unable to do so, it does not go on to authorise an assessment to be imposed for that purpose, or in the case of the sixty-six parishes in Scotland where there is yet no assessment, to declare that the persons liable in poor-rates shall make provision for the purpose. A duty is thus imposed upon the parochial board, and the question comes to be, whether the necessary means for fulfilling that duty shall be held as having been impliedly granted?

"In construing Acts of Parliament courts of law have no power to supply a *casus omissus*, of which there is an illustration in *M'Lean* v. *Rankine*, 5 R. 1053; and then there is another rule with regard to taxes, to the effect that these cannot be held to be imposed except by express words. 'A taxing Act,' said Lord Cairns, L.C., 'must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed' (*Fox* v. *Rabbits*, L.R., 3 App. Ca. 478). Now, undoubtedly, there is no authority expressly given to the parochial board to impose an assessment beyond the purpose of the Act of 1845, as construed by the above-mentioned decisions, which limit the application of the assessment to the relief of aged and impotent poor. Can such a power be implied in regard to a case where a duty is imposed which cannot be fulfilled without the exercise of such implied power?

"The Lord Ordinary is of opinion that such a power is here implied. The object to be served is in the same direction as that to which the poor's funds are devoted. Where the alternative lies between supplying words or powers by implication, or adopting a construction which deprives existing words of all meaning or force, it is legitimate to adopt the implication, although it imposes an additional burden in the shape of taxation. The maxim is applicable to such a case as this which says, *Quando lex aliquid concedit, conceditur et id sine quo res ipsa esse non potest.* Therefore the Lord Ordinary has come to the conclusion that parochial boards must, in fixing upon the amount of the assessment to be imposed for the current year, or where there is no assessment, in fixing upon the amount to be levied under the Poor Law Act, make provision for probable demands to be made upon them for the payment of school fees on account of the children of parents who are not paupers, but who are unable to pay for education, or, if they do not think it proper to anticipate such demands, they are entitled to lay on an additional or supplementary assessment when they are made if there be no funds to satisfy them."

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK — This is not a case of much difficulty. Though at first sight it seemed that the parochial board had not got under the statute sufficient assessing powers to carry out these duties, I should have entertained no doubt that such might be inferred. The difficulty here lies in this. The parochial board under the Act of 1845 are empowered to assess for sums necessary for the Poor Law Act. But the payments to be made under the Education Act for the school fees of poor persons tend to raise the sums to be recovered by assessment. This, however, is only an apparent difficulty, for if the parochial board have not enough of funds in their hands to meet the demands of the 1872 and 1878 Acts

they must add year by year to their assessments. There is no difficulty whatever in this. All the statute does is to compel the application of certain funds for the relief of the poor to educate them.

LORD YOUNG—I can see no shadow of difficulty in this matter. The Act of 1845 requires and authorises the various parochial boards to raise in one or other specified manner funds requisite for the relief of poor persons entitled to relief, and the Act lays down certain rules for the purpose of determining who shall be entitled to such relief. Now, if the Act of 1845 had stated further that parents unable through poverty to pay school fees for their children might claim from the parochial board out of the parochial funds sums sufficient for that purpose, they would have got it under the statute. What does it signify that they get it under a different Act, *i.e.*, the Education Act of 1872? The objects of this Act are the same as those of the Act of 1845. Its purposes are quite akin to the purposes of the latter Act, though for certain intelligible considerations it was desirable in some respects to distinguish between them. It is in fact a payment to enable a poor parent (*i.e.*, a parent unable through poverty to provide education for his children, in contradistinction to a parent poor in the sense of not being able to provide actual sustenance for his children) to educate his children. It is absurd for the parochial board to say that they have no authority to raise funds for the purpose out of the poor funds. Why should they say so? It does not matter where the authority is given; it is given by an Act of Parliament which must be obeyed. Up to this time the parochial board is prohibited from giving relief to "able-bodied" men. If an Act of Parliament were to say that such should be relieved, then I apprehend that the parochial board would have to obey, and it would be as idle as in the present case to say that they lacked sufficient power of assessment.

I am clearly of opinion that this action is unfounded, and does not raise a stateable question.

LORD ADAM concurred.

The Lords adhered.

Counsel for Reclaimer—Guthrie Smith—J. A. Reid. Agents—Curror & Cowper, S.S.C.
Counsel for Respondents—Gloag. Agent—George Wilson, S.S.C.

Tuesday, October 25.

SECOND DIVISION.

[Sheriff Court of Midlothian.

CHRISTISON *v.* M'BRIDE.

(Before the Lord Justice-Clerk, Lords Young and Adam.)

Contract—Lottery—Pactum illicitum.

The Court will not entertain an action brought by one who alleges himself to be the holder of the winning ticket in a lottery for delivery of the prize.

Charles M'Bride, residing in Edinburgh, resolved to dispose of a trotting pony, named "Boy G," by a subscription sale on the Art Union principle, and announced that the drawing of the tickets for the said sale, which were to cost one shilling each, would take place at 29 Lothian Road on 4th May 1881. William Christison purchased one of the tickets—No. 160—which proved to be the winning number. Accordingly, in answer to an advertisement in the *Scotsman* on 5th May to that effect, he presented this ticket to M'Bride, and requested delivery of the pony. This request having been refused, the present action was raised in the Sheriff Court of Midlothian to have M'Bride ordained to give up the pony. The defender averred in his condescendence that besides the pursuer himself, the pursuer's son, a Mr Rafferty, auctioneer, who stated he had purchased the ticket from the former, and Mr Munro, had all claimed the pony. Being at a loss therefore to determine who really was entitled to delivery of the pony, he offered, although he was not under any legal obligation, to deliver it up on receiving possession of the winning ticket, with the receipt of the different claimants, but after deduction of the expense of keeping the pony from the date of the drawing.

He pleaded — "(1) The subscription sale founded on having been merely a lottery, not authorised by Act of Parliament, and therefore illegal, the prayer of the petition falls to be refused. (2) The defender having been all along willing, and being still willing, to authorise delivery of said pony to be made to the true owner of the winning ticket, the action was unnecessary, and ought to be dismissed.

The Sheriff-Substitute (HALLARD) allowed a proof before answer, and after proof found "In point of fact, (1) That a lottery was held on 4th May last in the shop of William Miller, spirit dealer, 29 Lothian Road, in which the prize was to be a pony, referred to in the record and in the evidence as 'Boy G;' (2) That the present action is founded on the averment that the pursuer is proprietor by purchase of the winning ticket therein: Found in point of law, (1) That lotteries are illegal and *pacta illicita*, except when expressly declared legal by statute; (2) That the transaction on which the pursuer's claim is founded is not within any such statutory exception: Therefore sustained the defender's first plea-in-law; dismissed the action," &c.

He added the following note:—"Lotteries like the present were made illegal by section 2 of 42 Geo. III. cap. 119. There have been excepting statutes, such as 9 and 10 Vict. c. 48, but it is clear that the present transaction does not come within any such exception. It is mere evasion to speak of it as a subscription sale on the Art Union principle.

"If so, the transaction, being not a *sponsio ludicra*, but a *pactum illicitum*, can take no benefit from the cases of *Graham* v. *Pollok*, on 5th February 1848, and *Calder* v. *Stevens*, 8th July 1871. There the transaction before the Court was not illegal. The Court would have refused to declare which of two or more competing horses or dogs had won a race. That would have been the enforcement of a *sponsio ludicra*; but there being no question as to the winner, action lay against the stakeholder, in respect of the patrimonial interest arising out