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

of the undisputed fact that a certain animal had won. Here the basis of the action was a *pactum illicitum*, and therefore the rule applies *melior est conditio possidentis.*"

The pursuer appealed, and argued — The Sheriff-Substitute was wrong. The statute of 42 Geo. III. cap. 119, sec. 2, did not apply to Scotland, and even if it did the Court would entertain such an action as the present, where the defender admitted that the ticket No. 160 was the winning number in the lottery (*vide Graham* v. *Pollok*, Feb. 5, 1848, 10 D. 646; *Calder* v. *Stevens*, July 20, 1871, 9 Macph. 1074). The Court was only called on to stop a dishonest course of action (*vide M'Allister* v. *Douglas*, March 20, 1878, 5 R. 30).

The defender argued—The Sheriff-Substitute was right in dismissing the action. It was a rule of common law, quite apart from statute, that the Court should not be diverted from serious and important business by entertaining such cases—*Foulds* v. *Thomson*, June 10, 1857, 19 D. 803.

At advising—

LORD YOUNG—I am of opinion that the Sheriff-Substitute's judgment is right here, and I think it proper to state that I do not accept the suggestion made that the defender is acting dishonestly in this case, which, in any other point of view than a legal one, a man would be who exposed an article to be competed for, and then after getting the money for the entries refused to give it up, because he explains to us on record that he has no objection to give up the pony to the holder of the winning ticket as soon as the parties settle amongst each other who that person is, though at the same time he suggests that this is not a suitable tribunal for trying the dispute, because the Queen's courts do not exist for settling disputes as to who is the drawer of the ticket and entitled to the prize. I call this a suggestion for the Court, because I should have stated it myself as a reason why such a dispute should not come up for trial here. I am of opinion that neither the Sheriff nor this Court has been in the habit of entertaining, or will entertain, an action of this kind. I do not entertain any opinion on the question whether a lottery for pictures or a pony is illegal in the sense of punishable, or that it is competent to put a stop to such by interdict as *contra bonos mores*, although, as your Lordship has said, it is familiar to those who are concerned with the administration of the Crown law of this country that the Sheriffs and procurators-fiscal are instructed to protect the public by putting a stop to such lotteries. I know that there are various opinions on this question, and therefore in giving my opinion here against this lottery I merely give it to this extent, that an action founded on it as *medium concludendi* cannot be sustained here or in the Sheriff Court.

LORD ADAM concurred.

LORD JUSTICE-CLERK—I am not sure that it is merely a question as to whether this is a case which can be competently heard in this Court. But I am clearly of opinion that it is a contract not only not lawful, but also one which this Court will not entertain, and there is plenty of authority on the point.

The Court therefore sustained the judgment and dismissed the appeal.

Counsel for Appellant—Rhind. Agent—James Andrews, L.A.

Counsel for Respondent — Campbell Smith. Agent—David Forsyth, S.S.C.

Wednesday, October 26.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

EWING *v.* EWING AND OTHERS.

Fee and Liferent—Right of Fiar to Plant Trees on the Estate, and Preserve them from Damage by Game and Rabbits during Liferenter's Possession, or to cause Liferenter so to Preserve them.

Form of conclusions of summons in an action of declarator and damages by a fiar against a liferenter in possession for the protection from injury by game and rabbits of young trees planted by him on the estate during the liferenter's possession, and averments which were in support thereof admitted to proof before answer.

Humphrey E. Crum Ewing, proprietor in fee of the estates of Strathleven and Dumbarton Moor, raised this action of declarator and damages against Mrs Jane Tucker Crawford or Ewing, widow of the late James Ewing of Strathleven, and liferentrix under his trust-disposition and settlement of the said estates, and against her game tenants thereon for their interest in the premises. The conclusions of the summons were as follows:—"Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session—(1) That the pursuer is entitled, by himself or others in his employment, for the protection of the trees planted by or belonging to him on the said estate, to kill hares and rabbits or otherwise, and at least rabbits, within the plantations on said lands and estate, and that by shooting, snaring, and all other lawful means, within the said plantations, and in the fences surrounding the same; (2) that the defender, the said Mrs Jane Tucker Crawford or Ewing, is not entitled to cause or allow to exist and breed within the said plantations, or on the said lands and estate, a stock of rabbits or hares incompatible with the life and growth of the trees in said plantations, or with the fair and ordinary enjoyment by the pursuer of his proprietory rights in the said plantations; (3) that otherwise, and in any view, the said defender is not entitled to cause or allow to exist and breed on said lands or estate or otherwise, and at least within and around the said plantations, a stock of rabbits or hares in excess of what is usual and ordinary and reasonably sufficient for the purpose of sport; and further, it ought and should be found and declared by decree foresaid that the said defender has acted wrongfully, and to the pursuer's loss, injury, and damage — (1) In forcibly, and by herself and her game tenants with her authority, preventing the pursuer and