Saturday, December 5.

SECOND DIVISION.

[Sheriff of Perthshire.

MARTIN AND ANOTHER *v.* MACDOUGALL'S TRUSTEES.

Trust — Educational Trust — Bursary "For Students about to Enter on their First Session" — Whether Contract with Competitor is formed by Advertisement—Reparation.

The trustees of a fund for providing bursaries at various universities advertised for competition certain bursaries, the persons eligible being students "about to enter on their first session, and who shall pass the entrance examination for students who begin their course with the classes of the second year." They admitted to competition and conferred a bursary upon a student who had already attended college for one session, and was about to enter the second year. A competitor who fulfilled the conditions and came next to this person in the competition, complained that the bursary had been wrongly conferred upon him. *Held* that though the trustees had deviated from the intention they advertised, they had no contract with any competitor, and had committed no actionable wrong.

By trust-disposition and settlement dated 29th May 1883, and codicil thereto dated 6th June 1883, Miss Isabella MacDougall, of 29 King Street, Perth, directed her trustees, the Rev. William Carmichael and others, after the fulfilment of certain other purposes, to hold the residue of her means and estate for the foundation of certain bursaries to students born in the county of Perth, and attending the classes in the Faculties of Arts in the Universities of Edinburgh, Glasgow, and St Andrews, and out of the free annual income of said residue "to make payment of one or more bursaries of such amount or amounts, not exceeding £50 per annum, and to be tenable for such period or periods, not exceeding three years, as may be fixed by my said trustees." It was further directed that the said bursaries of my said trustees as patrons thereof, and shall "shall be in the gift and appointment be held under and subject to, *inter alia*, the conditions and regulations following:—(*First*) The said bursaries shall be conferred on students, of whatever religious denomination, after such complete examinations, at such place or places, and at such time or times as shall seem fit and proper to my trustees: (*Second*) My said trustees shall annually appoint three individuals, properly qualified, to superintend the examination of the students for bursaries, and to report upon the qualifications of the candidates, and to pay to each of these examiners a suitable fee for his trouble, but the opinion of the said examiners as to the qualifications of the candidates for bursaries shall be subject to review of my said trustees."

She died upon 12th June 1883, and her trustees entered upon the management of her trust-estate. Acting under the powers conferred upon them in regard to the foundation and payment of said bursaries, they in July 1884 inserted in various newspapers an advertisement stating that they "are to offer, under the conditions specified in her deed and settlement, and the rules and regulations made by them in virtue thereof, to students attending the classes in the Faculty of Arts in the Universities of Edinburgh, Glasgow, and St Andrews for the session 1884-85, with a view to graduation, three bursaries of £30 each, tenable for three years, to students about to enter on their first session, and who shall pass the entrance examination for students who begin their course within the classes of the second year, one to each of said Universities, said last-mentioned bursaries to be of the value of £33 for the second year and £37 for the third year." The advertisement further stated that the competition would take place on the 27th September 1884, and after narrating the subjects of examination for the several bursaries, added, "that the examination will be conducted by competent examiners, whose opinion as to the qualification of candidates for bursaries will be subject to the review of the trustees," and candidates were requested to give in their names to Mr William Cochrane Young, agent for the trustees.

John Howie Martin, Glasgow, applied to Mr Young to enter his name as a competitor 'for the MacDougall Bursary offered to first year's students at Glasgow University for session 1884-85.' He was accordingly examined on 27th September in terms of the advertisement, and in the report of the examiners the names of the first three candidates were entered in the following order—1st, William John Brough; 2d, Arthur D. Miller; 3d, John Howie Martin. After the examination, and as the result of the competition, the bursary for Glasgow University was allotted by the trustees to Arthur D. Miller, who had already attended a session at Glasgow University, and was about to enter on his second year's study at the University. The trustees allotted no bursary to Martin, but through their agent wrote to him inquiring whether, in the event of their conferring upon him the bursary at St Andrews University he would attend that University. In his reply he declined to attend the University at St Andrews, and claimed to be entitled, as the result of the competition, and of his being second highest of the *first* year students competing, to be appointed to the bursary which had been allotted to Miller.

Martin raised this action, with consent and concurrence of his father John Martin, against the trustees for the sum of £30, the amount of the bursary, as the loss and damage he had sustained from their having, in breach of the contract entered into between them through the medium of the advertisement and rules and actings of the parties, bestowed the bursary on Miller.

He averred—"(Cond. 5) The said Arthur D. Miller was not a 'first year's student who had passed the entrance examination for students who begin their course with the classes of the second year,' but was a second year's student, having attended Glasgow University during the session 1883-84. When entering that University at the commencement of the session he passed the entrance examination for students who begin their course with the classes of the second year. The said Arthur D. Miller should not therefore have been allowed to compete with the said pursuer and other first year's students." In Cond. 7 he averred that he possessed all the qualifications for first year's students stipulated for under the advertisement, rules, and regulations.

The defenders stated—"The defenders having made it a condition of said competition for said bursaries, payable to students about to enter on their first session, that said bursaries should only be conferred in the event of the candidates passing the entrance examination for students who begin their course with the classes of the second year, and as the competition was thus practically confined to candidates prepared to enter into the classes of the second year, the defenders agreed to admit to said competition for said bursaries candidates about to enter the classes of the second year, although they had already attended the classes for one year. The subjects of examination at the competition for said bursaries for first year's students were prepared for students about to enter the classes of the second year."

The pursuers pleaded—"(1) The said pursuer having fairly gained said second prize, advertised as aforesaid by the defenders, ought to have received payment of the same from the defenders, and should now obtain decree as prayed for. (2) Said bursary having been bestowed by the defenders as aforesaid upon the said Arthur D. Miller, although he was not entitled thereto, and in breach of contract as before set forth, the pursuer is entitled to be compensated for having been deprived thereof, and decree ought therefore to pass in his favour, as prayed for in the petition, with expenses."

The defenders pleaded, *inter alia*—"(1) The defenders having, in the exercise of the powers conferred upon them by the said trust-disposition and deed of settlement of the said deceased Isabella MacDougall, appointed the said Arthur D. Miller to the bursary to students attending Glasgow University, the amount of which is sued for, the pursuer the said John Howie Martin has neither title nor interest to insist in the present action." They also pleaded that they having the sole power of appointment it was incompetent for any Court to appoint the pursuer to the disputed bursary or ordain them to pay him the amount thereof.

The Sheriff-Substitute (GRAHAME) pronounced this interlocutor—[*After findings in fact from which the above narrative is in substance taken*]— . . . "Finds in point of law that the defenders, in refusing to appoint the first-named pursuer to hold the bursary in question, have not acted in breach of any contract entered into between them, as Miss MacDougall's trustees, and the said pursuer, or specially in breach of any obligation undertaken by them to said pursuer in the advertisement and regulations and conditions of the competition for said bursary: Therefore assoilzies the defenders from the conclusions of the action, &c.

"*Note.*—. . . The ground on which the pursuer's claim is founded is, that in terms of the advertisement in which the defenders announced that a competition for the MacDougall bursaries would take place, and according to which candidates were invited to compete, they bound themselves to conduct the examination under conditions which excluded the candidate to whom the bursary in question was awarded, and entitled the said pursuer to obtain the appointment to it. I do not think that a reference to the terms of the advertisement, and the conditions and regulations under which the competition for the bursary was announced, shews that the defenders in not appointing the pursuer were guilty of a breach of contract with him, or broke any of their obligations to him as Miss MacDougall's trustees. The special allegation made against them is that, having announced that the competition for the said bursary was to be limited to students of the Universities of Edinburgh, Glasgow, and St Andrews entering upon their first year's session, they notwithstanding allowed a student to compete who was not entering on his first year's session, and wrongously preferred and appointed him to hold a bursary, to which the pursuer, as having been a duly qualified candidate, and as having ranked next in order in the result of the examination in the competition, claims he ought to have been appointed. Whether the party appointed by the defenders to the bursary in question is now in rightful possession of it or not is not the question now at issue. He may possibly be in legal possession, and the pursuers still have a claim against the defenders, as not having fulfilled their obligations to him in inviting him to become a candidate according to the terms of their advertisement, and allowing him to take part in the competition for the bursary. The question here is not as to the right of the pursuer's opponent, but as to his own claim against the defenders' alleged injustice, and whether they, in their refusal to appoint him to the bursary, broke the terms of their agreement with him, and are therefore liable for reparation of the wrong committed. Assuming that the defenders admitted as a competitor for the bursary a candidate who did not fulfil the conditions required in their advertisement, and that they notwithstanding appointed him to the bursary to which pursuer alleges he was entitled to be appointed, that does not establish his right to the compensation he claims. He must shew that the defenders had come under an obligation which entitled him to claim the bursary, and that the defenders in refusing to appoint him to it were guilty of a breach of the contract which they had entered into with him. In determining whether this is the case it is necessary in the first place to consider what occurred at the competition, and whether in the circumstances the defenders are to be held as bound, in fulfilment of an obligation to the said pursuer, to appoint him to the bursary. At the examination in the competition the pursuer admittedly obtained the third place, the competitor immediately above him being the party whose qualifications to compete are alleged, and may I think justly be considered, to have been defective. But though such was the case, it does not therefore follow that under the terms of the advertisement and conditions of the competition the pursuer thereby acquired a legal claim to be appointed to the bursary in question. A reference to the conditions of Miss MacDougall's trust-deed, and to the regulations made by the trustees under the powers therein conferred upon them, and which regulations are specially referred to in the advertisement, shews that the defenders did not undertake that the result of the examination at the competition was to be held as necessarily decisive of the appointment to be made, but that the trustees reserved to themselves a *delectus personæ*, under which a competitor who had been successful in the examination might nevertheless be refused the appointment to the bursary to which, if his place in the examination was to be

taken as establishing his right, he would have been entitled. In the conditions of the competition it is stated 'that the opinions of the examiners as to the qualifications of candidates for bursaries will be subject to review of the trustees.' The question which arises is, what is the meaning of, and the effect that ought to be given to, this reservation of a power of review to the trustees? Is it merely a power of reviewing the opinions of the examiners as to the place to be assigned to each of the competitors as determined by the result of the examination, that result being held decisive as to the appointments to be made to the bursaries competed for; or is it a reservation of more extensive application, and one having reference generally to the qualifications of the competitors for the appointments, not only as brought out by the results of the examination, but according to the opinions of the trustees themselves, acting as patrons of the bursaries under Miss MacDougall's deed? I think that the reservation, though not very distinctly expressed and stated in such terms as might be deceptive to the competitors, must be held to have legally the more general application, and thus to afford a sufficient legal answer to the pursuer's claim. A reserved power on the part of the trustees to review the examiners' opinions as to the qualifications of the competitors must, I think, be taken as meaning a power reserved to the trustees, if they think fit, to set aside these opinions, and to decide for themselves as to the competitors' qualifications, and thus to determine the appointment to be made not merely by a consideration of the competitor's place in the examination, but according to their own judgment, as patrons, of his fitness for the appointment. According to this reserved power, it would appear that even if the pursuer had stood first in the examination, he did not thereby acquire a legal right, however strong might be his moral claim, to be appointed to any bursary. It is this *delectus personæ* reserved to the trustees that furnishes an answer to the pursuer's claim. If it could have been held that, on the ground of the appointment of a non-qualified competitor by the trustees, and of the pursuer's own sufficient qualifications, as tested at the examination, that he had thereby acquired a right to the bursary in question, the action of the trustees in refusing to give him the bursary which they had conferred on another unqualified competitor, would have enabled him to plead a breach of contract by the trustees, and to claim compensation for not being appointed to the bursary; for whatever may be the true view as to the validity of the appointment made by the trustees to the bursary, there can be no doubt that the admission of the candidate Miller to the competition was not consistent with its conditions as announced in the advertisement of the defenders as Miss MacDougall's trustees. The objection to giving effect to the pursuer's claim is, that the injury which the pursuer alleges he has sustained through not receiving the appointment in question was not necessarily a consequence of Miller's appointment; for even if Miller had not been appointed, the trustees were not bound to appoint the pursuer, and unless he can show that the trustees had come under an obligation which entitled him in the circumstances to obtain the appointment, it cannot be held that, on the ground of the trustees' breach of contract in appointing Miller, the pursuer is now entitled to compensation for not getting the bursary. Thus, though I feel that the pursuer may have reasonable ground of complaint against the defenders' proceedings, I cannot hold that he has in the present process established any legal claim for compensation in consequence of injury sustained through the actings of the defenders as Miss M'Dougall's trustees."

The pursuers appealed, and argued—There was a breach of contract on the defenders' part in their admitting to the competition one who had not the requisite qualifications. Their advertisement was precise in its terms. It fell to be construed literally, because it had induced the minor pursuer to enter as a competitor.

The defenders replied—In order to succeed the pursuer must establish (1) that he had a title to any of the bursaries, and (2) that he had a title to this particular bursary. This he could not do. The clause as the power of review reserved by the trustees as to a competitor's qualifications gave the defenders a right to take up the position they did. They would have had a right to disregard the examiners' report altogether.

Authority—*Ramsay* v. *United College of St Andrews*, June 28, 1860, 22 D. 1328, *aff.* June 4, 1861, 23 D. (H.L.) 8.

At advising—

Lord Young—This is a somewhat peculiar case. It is an action of damages by a student in the College of Glasgow against the trustees of a benevolent lady deceased who left money in their hands with instructions to apply it to the foundation of bursaries for the benefit of students from Perth attending the Colleges of Edinburgh, Glasgow, and St Andrews. The ground of action is, that the trustees having advertised for competition certain bursaries which they had founded out of the trust money, and the pursuer having competed accordingly, he was deprived of a bursary in consequence of its having been given to one who, according to the terms of the advertisement and invitation, ought not to have been admitted to the competition at all. The advertisement and invitation to compete set forth that the trustees were to offer for competition under the conditions specified in the trust-disposition and the rules and regulations which they had made in virtue thereof, "to students attending the classes in the Faculty of Arts in the Universities of Edinburgh, Glasgow, and St Andrews, for the session 1884-85, with a view to graduation, nine bursaries, of the aggregate value of £300, viz.—Three of £37 each, tenable for one year, to students about to enter on the fourth session of their academic course, one to each of said universities; three of £33 each, tenable for two years, and of the value of £37 for the second year, to students about to enter on their third session, one to each of said universities; and three of £30 each, tenable for three years, to students about to enter on their first session, and who shall pass the entrance examination for students who begin their course with the classes of the second year, one to each of said universities—said last-mentioned bursaries to be of the value of £33 for the second year and £37 for the third year." Now, that is a very distinct advertisement, and a distinct invitation to young men

to come forward and compete. The pursuer says that he was about to enter on his first session at the College of Glasgow, but was prepared to pass the entrance examination for students who begin their course with the classes of the second year—that is to say, as I understand it, he was prepared to take a three years' course instead of a four years' course, the condition of the shorter course being the passing of a certain examination which is thought to be sufficient to show that the student is so advanced in his studies as to be entitled to that privilege. Now, the advertisement being in the terms I have read, it is not disputed that a young man was admitted to the competition who had already attended for one session at the College of Glasgow, and consequently was not one of those who, in the language of the advertisement, were "about to enter on their first session," but was about to enter on his second session. The explanation which the trustees give is that it appeared to them that if a student was prepared to pass the entrance examination—which they say the student in question was—it did not signify whether he had acquired his qualification to pass that examination by attending for the previous year at college or by continuing for a year longer at school—that the material fact was his fitness to pass the examination. Now, I understand that explanation—it is not unintelligible—but I am sorry to say that I can say no more. It is plainly at variance with precise and clear advertisement and invitation to students about to enter on their first session to come forward and compete for the bursaries, and I must regret that the trustees should have thought fit to depart from the terms of their own advertisement and invitation. I do not doubt for a moment that they intended to act in perfect good faith, and meaning to exercise a reasonable judgment, but it is a pity that they did not put into the advertisement an intimation that they at all events reserved to themselves the right to admit to competition students of the second or of any year if they thought that proper.

I say no more, however, on this topic. But what we have to consider is, whether the trustees by exercising their judgment and discretion as they did, and admitting to competition a student about to enter on his second year, did an actionable wrong to the other competitors; and my opinion is that they did not. It is not said that they were violating their trust in any way—that they were acting contrary to the terms of the trust-deed, and therefore the case appears to me in no respect distinguishable from that of a benevolent individual who was a benefactor of learning and of students prosecuting their studies, issuing a similar invitation and advertisement, and then in the exercise of his discretion admitting a young man whom he thought favourably of, though he did not comply with the terms of the advertisement by which the competitors were invited to present themselves. I think it would be a pity if anyone were to exercise his discretion in that way and so disappoint others, but I am not prepared to hold that he would by so doing commit an actionable wrong. I greatly regret the case of this young man if he has really suffered any prejudice, which he may have done, coming forward with some labour, I suppose, and experiencing almost necessarily some anxiety, and then being ousted from the reward of his success—for he appears to have been successful—by the superior skill of one who had been at the University before; but while regretting that greatly, I am unable to hold that there was any contract between him and the trustees in respect of which it can be recognised as a wrong against him which would found an action of damages at his instance that the trustees have thought fit so to act.

Upon these grounds, which are substantially the grounds of the Sheriff-Substitute, I think our proper course is to dismiss the appeal, but in respect of the whole circumstances—the very special circumstances—of the case I should propose to your Lordships that we should make this variation on the judgment of the Sheriff-Substitute—namely, to recal his finding in regard to expenses, and to dismiss the action without expenses to either party either in the Sheriff Court or here.

Lord Craighill—The sum sued for is £30, and this is claimed as damages for breach of an alleged contract said to have been concluded between the minor pursuer and the defenders relative to a bursary of which the defenders are patrons. The facts of the case are these—[*His Lordship narrated the facts*]. The question is, whether the Sheriff has misconstrued the legal import of the materials for judgment, and as a consequence done a legal wrong when in place of awarding damages to the pursuer he has assoilzied the defenders?

There is no doubt that looking simply at the words of the advertisement Miller was disqualified, though it is not difficult to see how the defenders may have been misled. The words used in the report by the examiners were that the competition was between "students about to enter classes of second year." And so it was, for even those who had not previously been at the University were, according to the conditions of this competition, to enter the second-class; or, in other words, to prove by their entrance examination, their fitness to be received as students for a three years' curriculum. The words used by the examiners, however, were not the words of the advertisement; for those who by it were invited to compete were "students about to enter on their first session."

The disqualification of Miller accordingly has not been made matter of controversy between the parties; and if the pursuer could as matter of contract show right to the bursary given to Miller, he might probably be entitled to the reparation which he seeks. But this, I think, has not been established. A bursary of £30 for one or other of the three universities was that to which alone the pursuer could lay claim. All three were open to all qualified competitors; and if each of the three best on the list got one of the three bursaries, that was all for which, assuming there was a contract between the defenders and competing students, the defenders had contracted. The defenders did not contract to give the pursuer the Glasgow bursary if he was one of the three first in the examination. They neither did nor said anything upon which the Court could put such a construction. The pursuer, no doubt, when he asked to be entered on the list of competitors intimated that he was to compete for the MacDougall Bursary offered for first year's students

at Glasgow University, but this never became a condition of the competition. Many others may have done the same. Be this, however, as it may, the defenders never parted with their right of selection or distribution among those to whom bursaries were to be awarded.

For these reasons, which are substantially those on which the Sheriff-Substitute has rested his judgment, I think that this appeal ought to be dismissed.

Lord Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court dismissed the appeal and affirmed the judgment except as to expenses, and found no expenses due.

Counsel for Pursuers (Appellants)—Strachan—Chisholm. Agents—Liddle & Lawson, S.S.C.

Counsel for Defenders (Respondents)—Asher, Q.C.—Dickson. Agent—Alex. Morison, S.S.C.

Saturday, December 5.

OUTER HOUSE.

[Lord Fraser.

MACGREGOR *v.* NORTH BRITISH RAILWAY COMPANY.

Railway—Public Company—Undertaking in Line of Company's Business—Ultra vires—*North British Railway Act* 1885 (48 *and* 49 *Vict. cap. cxix.*), *sec.* 35.

Held, on a construction of the North British Railway Act 1885, that the company were entitled to hold and to let to a tenant a hotel in connection with their business as public carriers.

Opinion that, apart from special powers, a railway company may build a hotel at a station on the line and let it out to a tenant.

The pursuer of this action, a hotel-keeper in Edinburgh, and a shareholder in the North British Railway Company, who acquired his shares in 1885, but was already the holder of stock as a trustee, sought declarator that the defenders, the company, were not entitled to hold lands, tenements, or houses which were not or had ceased to be required for their undertaking, as provided by their various Acts, but bound to sell such and apply the price to the undertaking, and that the defenders were not entitled, by their servants, tenants, interposed trustees, or any others, to carry on the business of hotel-keepers, or any other business not necessarily incident to the formation or use of their railway, or to acquire or hold lands in order to use them as a hotel, or to carry on therein the business of tavern-keeping, and that they were not entitled to apply their funds or credit in maintaining any property or business not authorised by their Acts. In particular, he sought that the defenders should be decerned to sell, as soon as reasonably might be, (1) an area of ground in Princes Street, Edinburgh, with the buildings thereon, known as the North British Station Hotel, which the company purchased in 1865, and (2) an area in Lothian Road, Edinburgh, with the subjects thereon, called the County Hotel, which they acquired in 1872. He also craved interdict against the defenders employing their funds or credit in hotel-keeping in these premises or elsewhere, or in enlarging them or adopting them to such business, or in paying costs incurred in promoting a bill in 1885 having for its object, *inter alia*, to remodel and improve their hotel adjoining the Waverley Station, Edinburgh, and known as the North British Station Hotel, or any other purposes not sanctioned by the company's Acts.

The pursuer alleged that the defenders' Acts incorporated them for the purpose of carrying on the business of a railway company, and for no other purpose whatever, and that they had no power to purchase or hold property for hotel-keeping, or carry on such a business; that since 1865 they had done so by their tenants in the North British Station Hotel, and expended their funds in maintaining and fitting it up, causing risk to the stockholders, and yielding an inadequate return; further, that by their bill of 1885 they sought power to increase that hotel, and that they contemplated altering it, making an entrance to it from their platform, and increasing its accommodation, and carrying on in it an extensive hotel business, which was contrary to law.

It appeared that the pursuer had opposed the preamble of the bill (having previously been unsuccessful in opposition to the scheme at a meeting of the company), but that the Committee found the preamble proved, and reported—"That the bill gives power to the company to enlarge, remodel, and improve their hotel and other property fronting Princes Street, in the city of Edinburgh. It was proved to the Committee that the hotel was purchased by the company, with the ground upon which it stands, many years ago, and has ever since the purchase been kept up and until lately let by the company as an hotel, but is now untenanted owing to the want of modern improvements and accommodation. From its proximity to the railway station it is conveniently situated for public accommodation, and would be useful to travellers by the railway and beneficial to the company. Under these circumstances the Committee were of opinion that the powers sought by the bill should be granted"—and that the bill became an Act, with this preamble; and that clause 35 of the Act provided—"Subject to the provisions hereinafter contained, the company may alter, enlarge, remodel, and improve their hotel and other property fronting Princes Street, in the city of Edinburgh, and raise the back portion thereof to the same height as the front portion, so as to form an uniform block; and the company may also take down, rebuild, alter, enlarge, and improve the general offices and buildings belonging to them, and situate between Princes Street aforesaid and the Waverley Station, and may erect other buildings on the site of the said offices or buildings removed, and on the court and other property of the company adjoining; and may acquire, vary, or extinguish all or any rights, easements, servitudes, and pertinents relating to the said hotel or general offices, or the land whereon the same are built, including the said court and other property belonging to the company," subject to certain provisos as to height, elevation, &c.; and "(6) The company shall not apply to the purposes of this section any of the capital by this Act authorised, and the power of raising any capital required for