

which is the leading subject of the clause, "it shall be lawful to charge the proper officer having the management of the accounts with the duty payable upon such interest." Now, it is quite clear upon the face of that that the Legislature intend that persons in the position of these Commissioners are to pay income-tax in the case which has occurred; and the way in which it is wrought out is simply this—in paying the interest upon the money which the Commissioners have borrowed, they deduct from the amount of the annual interest a sum corresponding to the income-tax chargeable upon that amount of interest, that is to say, instead of paying £92, 10s. which is the annual interest payable upon this debt, they pay £92, 10s. *minus* the amount of the income-tax. They therefore have not paid the full amount due to the creditor, and the reason why they have not paid the full amount due to the creditor is that they are liable to account for that part of the £92, 10s. to somebody else, and that somebody else happens to be the public exchequer or the tax-gatherer, or whatever you may call him. If they were allowed to keep that amount in their pocket, then it would be simply the case that the income-tax payable upon this £92, 10s. would be paid not to the public exchequer but to the debtor in the bond. And it is just to avoid that absurd result that this proviso is inserted at the end of the clause. It seems to me that the case is perfectly clear.

LORD SHAND, LORD ADAM, and LORD M'LAREN concurred.

The Court affirmed the determination of the Commissioners.

Counsel for the Commissioners of Supply—Cheyne—C. S. Dickson. Agents—MacKenzie & Kermack, W.S.

Counsel for the Surveyor of Taxes—A. J. Young. Agent—The Solicitor of Inland Revenue.

Tuesday, June 17.

FIRST DIVISION.

[Lord Trayner, Ordinary.

M'DONALD v. THE SYNOD OF ARGYLL AND OTHERS.

College—Bursary—Trust—Contract—Damages—Title to Sue—Relevancy.

A bursary was founded for "a student on his entering the Divinity Hall of any University in Scotland for the purpose of becoming a minister of the Established Church of Scotland, and that so long as he is pursuing his studies in the Divinity Hall." It was provided "that the qualification required of competitors for the Divinity Hall bursary shall be not only great proficiency in the ordinary branches of an university educa-

tion, but also speaking, reading, and writing the Gaelic language fluently and well, and also acquaintance with Gaelic literature of" a certain named standard. The charge of the bursary was entrusted to a committee of the Synod of Argyll.

A candidate for the bursary, who had unsuccessfully competed therefor at an examination, raised an action against the committee and the successful candidate (1) for declarator that he was duly elected to and was in right of the bursary; (2) for interdict against payment of the bursary to the successful candidate; (3) for reduction of the award; (4) for decree of payment to himself; and (5) for damages. He averred that the successful competitor "was not eligible to compete for the Divinity Bursary, he having been entered as a student, and having been a student at the Divinity Hall of the University of Edinburgh for at least one session prior to" the date of the examination; and that the fact of this ineligibility was known to the committee. He averred damage, but failed to specify in what way this had arisen. Further, it did not appear, and the pursuer did not aver, that the reduction of the appointment would entitle him to the bursary.

Held that as the pursuer had not been "duly elected to" the bursary, he had no title to sue the first and three following and subsidiary conclusions of the summons; and that as there was no contract between the committee and the pursuer, and no sufficient averment of damages, the action was irrelevant.

Angus M'Donald, a student in the University of Glasgow, raised the present action against the members of the Synod of Argyll and others, concluding for declarator that he had been duly elected to, and was in right of, a bursary of £119, tenable for three years, under the bequest of the deceased Gillian M'Laine, Fascalale, Ardrishaig, and, *inter alia*, for damages.

The action was raised in the following circumstances:—By trust-disposition and settlement dated 24th May 1875 the late Angus M'Laine, Fascalale, Ardrishaig, directed his trustees to invest a portion of his estate in certain securities in name of the Moderator and Clerk of the Established Church of Scotland, Synod of Argyll, who should hold and apply the annual produce of one-half of the capital "for a bursary to a student on his entering the Divinity Hall of any university in Scotland for the purpose of becoming a minister of the Established Church of Scotland, and that so long as he is pursuing his studies in the Divinity Hall; and it is hereby declared that the qualification required of competitors for the Divinity Hall Bursary shall be not only great proficiency in the ordinary branches of an university education, but also speaking, reading, and writing the Gaelic language fluently and well, and also acquaintance with Gaelic literature of such a standard as Dr Smith's

'Sean Dana,' Ossian, Alaster M'Donald, Duncan Ban, Dugald Buchanan, and other bards, 'Teachdine Gaelach,' and especially the Gaelic version of the Holy Scriptures; . . . and declaring that there shall not be less than three competitors for each bursary; . . . declaring that if at any time there shall not be three competitors for any bursary, either in the Faculty of Arts or Divinity Hall, the committee shall retain the income of the year in which there shall be no competition, and shall add it to the capital hereby provided and at their disposal for bursaries; . . . and I further declare that the said bequest shall be managed by a well-selected standing committee of members of the said Synod, to be elected from time to time at any meeting of the said Synod, said committee never to consist of fewer than five nor more than nine members."

The committee who were appointed to manage this bequest prepared certain regulations with a view of carrying out the testator's directions, the first of which provided, *inter alia*, as follows—“(1) The candidate shall be a student 'entering the Divinity Hall for the purpose of becoming a minister of the Established Church of Scotland. The qualification required shall be not only great proficiency in the ordinary branches of a university education, but also speaking, reading, and writing the Gaelic language fluently and well.' . . . (3) The classes shall be taken in due order, and the curriculum completed in three sessions."

On 2nd November 1888 the committee held a competitive examination at Glasgow to determine who should be the holder of the said Divinity Bursary for the three years following, and they thereafter awarded the bursary to David C. M'Michael, divinity student, University of Edinburgh.

Angus M'Donald, divinity student, University of Glasgow, a competitor at the examination, raised this action against the members of the Synod of Argyll and the committee in charge of the bequest and M'Michael, "(1) for declarator that he was 'duly elected to,' and is now in right of, the bursary; (2) for interdict against the defenders paying the amount of the bursary to Mr M'Michael; (3) for reduction of any minutes or other writings by the defenders awarding the bursary to Mr M'Michael; (4) for decree for payment to himself of a bursary for three years; and (5) for damages."

He averred—"It is the fact, as the pursuer has since discovered, and as was well known to the said committee at the time, that the defender the said David C. M'Michael was not eligible to compete for the said Divinity Bursary, he having been entered as a student and having been a student at the Divinity Hall of the University of Edinburgh for at least one session prior to the said 2nd November 1888. He matriculated at Edinburgh University for the Divinity Hall for the sessions 1887-8 and 1888-9, and in 1887-8 attended the classes of Divinity, Ecclesiastical History, Hebrew

(junior), and Celtic Languages and Literature. In 1888-9 he attended, amongst others, the classes of Divinity and Biblical Criticism. The words of the trust-disposition specially exclude any candidate who is not 'entering the Divinity Hall of any university in Scotland for the purpose of becoming a minister of the Established Church of Scotland.' The attendances of the said David C. M'Michael at the Divinity Hall were reported by him in common form to his presbytery, who sustained the said attendances as constituting and counting for one year's attendance at that hall, and as so far qualifying for the ministry of the Church of Scotland. . . . The pursuer has been put to great trouble and expense, and he has suffered serious loss and damage through the conduct of the defenders the said Standing Committee, and the sum of £500 is a moderate estimate of his loss. With reference to the statement of facts for the defenders the Standing Committee, it is explained that they had no power to withhold the said bursary if the conditions desiderated by the terms of the trust-disposition and settlement were fulfilled, namely, that three competitors should come forward who were 'entering the Divinity Hall of any university in Scotland for the purpose of becoming a minister of the Church of Scotland,' and that the successful candidate should show great proficiency in the ordinary branches of a university education, and also speak, read, and write the Gaelic language fluently and well, and have an acquaintance with Gaelic literature. The pursuer on the occasion in question took part in an examination when three candidates appeared, and did the best examination of the eligible candidates, fulfilling the necessary condition of showing—as in point of fact the examiners said he did show—great proficiency in ordinary branches and Gaelic. The fact that M'Michael was not an eligible candidate was not known to the pursuer, but was known to these defenders, and they are not now entitled to plead that the competition was void through their own fault. In point of fact these defenders held the said competition for the express purpose of giving the said bursary to the said David C. M'Michael, well knowing that they were committing a breach of trust and a fraud upon eligible candidates in admitting him to compete, and in giving him the bursary. The said David C. M'Michael was himself art and part in the said breach of trust and fraud. In point of fact the pursuer was in every way eligible and well worthy of receiving the said bursary."

The defenders denied that M'Michael was not eligible to compete for the bursary, and they further averred—"On 3rd September 1878 the first examination was held at Ardrishaig, advertisement having been previously made of the terms and conditions of the bequest, and the regulations of the competition. There were three candidates in divinity. The committee, however, refused to award the bursary, none of the candidates representing in their view the excellence of scholarship required by the

terms of the bequest. Since then examinations have been held periodically, but on several occasions the competition fell through, there not being three competitors. The competition to which this action has reference was held on 2nd November 1888, when only three competitors attended. The defender M'Michael was awarded the bursary by the committee, he being considerably in advance of the other competitors, of whom the pursuer was one. Even supposing defender M'Michael were disqualified, or had not been allowed to compete, it by no means follows that in that event the bursary would have been awarded to either of the other competitors, it being quite in the power of the committee to withhold it altogether."

The pursuer pleaded—“(1) The pursuer having been the successful candidate for the said bursary, he is entitled to declarator, interdict, reduction, and payment as concluded for. (2) The defenders the said Standing Committee having acted in *mala fide*, and contrary to the provisions of the trust-disposition and settlement of the late Angus M'Laine, in allowing the defender M'Michael to compete for, and in awarding to him the said bursary, and the pursuer having fulfilled all the conditions necessary for obtaining the said bursary, the pursuer is entitled to decree of declarator, interdict, and reduction as craved. (3) The defenders having been guilty of breach of the contract entered into between the pursuer and the said Standing Committee, are liable in damages as concluded for. (4) The defender David C. M'Michael having been art and part in the breach of trust and fraud of the said committee, is in any view disqualified from taking benefit by that fraud. (5) The said committee having acted fraudulently and in breach of trust in preferring the said David C. M'Michael, are not now entitled to say that in their discretion they might have rejected the pursuer, because they never intended to elect him. (6) In respect of the loss and damage sustained by the pursuer as condescended on, he is entitled to damages as concluded for.”

The defenders pleaded, *inter alia*—“(1) No title to sue. (2) The pursuer's statements are irrelevant.”

On 19th July 1889 the Lord Ordinary (TRAYNER) sustained the first and second pleas-in-law for the defenders, and dismissed the action.

“*Opinion*.—In November last the pursuer with two other students competed for a bursary, the power to appoint to which is vested in the defenders. The pursuer was not successful, the bursary being conferred on Mr M'Michael, one of his competitors. The pursuer now avers that Mr M'Michael was ineligible according to the conditions laid down by the founder of the bursary; that he (the pursuer) was second in the competition, and should therefore, as the best eligible competitor, have been appointed. He has accordingly brought this action, in which he concludes (1) for declarator that he was ‘duly elected to’ and is now in right of the bursary; (2) for

interdict against the defenders paying the amount of the bursary to Mr M'Michael; (3) for reduction of any minutes or writings by the defenders awarding the bursary to Mr M'Michael; (4) for decree for payment to himself of a bursary for three years; and (5) for damages.

“It is quite clear that the pursuer cannot succeed in his first conclusion for the simple reason that on his own averment he was not elected to the bursary. It follows that he must equally fail in his fourth conclusion, for if he is not the bursar, then he cannot claim payment of the bursary. Not being the bursar, he has no claim or title to interdict against the defenders from paying the amount of the bursary to Mr M'Michael or anyone else, it being no concern of the pursuer's to whom the defenders paid it if they are not bound to pay it to him. Nor has the pursuer any interest or title to insist in the reductive conclusions, because, although the writings challenged were reduced, the pursuer could take no benefit thereby. The reduction of Mr M'Michael's appointment to the bursary would not entitle the pursuer to the appointment; he does not even aver that it would, and even if by the reduction sought the bursary was declared vacant and open to renewed competition, it does not follow that the pursuer would be the successful competitor. Indeed, according to the reading contended for by the pursuer himself, of the conditions imposed by the founder of the bursary in reference to the qualifications of competitors, the pursuer would not now be eligible to compete.

“The only other conclusion is that for damages. To succeed in this, the pursuer must show that he has suffered some wrong, that is, some wrong which the law recognises as a ground of action. I think he has not averred any such ground. There was no contract between the defender and the pursuer. They invited him and others to compete for the bursary, but were under no obligation to confer the bursary on him. Even if the pursuer had been the best and most highly qualified of the competitors, the defenders might (in exercise of their legal right) have conferred the bursary on a less qualified competitor, provided they judged him to have the qualification required in every bursar under the conditions imposed by the founder. I think this case is practically ruled by the decision in the case of *Martin*, 13 R. 274.

The pursuer reclaimed, and argued that his averments showed that he had been wronged, and were relevant to entitle him to a proof of the damage he had sustained. The pursuer laid his action alternatively—(1) on contract, or (2) on delict. (1) There was a contract between him and the committee in respect of the regulations for the examination, these had been broken by the committee in awarding the bursary to an ineligible competitor, and so an action of damages lay at his instance against the committee. (2) In allowing M'Michael to compete when they knew he was not qualified, the committee had committed a delict or *quasi-delict*, and so were liable in damages

—*Ramsay v. The United Colleges of St Andrews*, June 28, 1860, 22 D. 1328; *Auld v. Shairp*, December 16, 1874, 2 R. 191.

Argued for the respondents—The only question was whether in the circumstances alleged the pursuer was entitled to damages, and on this point the pursuer had made no relevant averment. He had not alleged that he was out of pocket, or had been put to any expense, and no mode of measuring the damage, if he had incurred any, had been averred. No contract existed between the parties, and the committee were not under any obligation to elect the best of the candidates who offered, or any of them. The action was irrelevant and incompetent — *Martins v. MacDougall's Trustees*, December 5, 1885, 13 R. 274.

At advising—

LORD PRESIDENT—As to the main part of this case, or what may be termed the merits, there is nothing whatever to be said except what the Lord Ordinary has remarked in the opening paragraph of his note.

The pursuer's averments are opposed to the facts of the case. He was not, as a matter of fact, elected to this bursary, and consequently the remaining conclusions of the summons, which are subsidiary to this one, and depend upon it, fall with it, leaving only the question of damages to be dealt with.

No doubt if anyone is a competitor for a bursary, and if the committee who control the election corruptly prefer to the bursary a candidate who is conspicuously disqualified, the party injured will be entitled to recover damages from those who commit the delict.

Turning then to the record, and to the averments contained in condescendence 6, one cannot but feel that these averments are apparently relevant (though I feel equally satisfied that the pursuer would have completely failed to prove these averments), and that had they only been followed by an articulate statement of the damage which he considered that he had sustained, then I feel that it would have been impossible to have refused inquiry. But the pursuer has not adopted this course, nor has he suggested that he has suffered any pecuniary loss in attending or in entering into this competition. He was residing at the time in Glasgow, and he came up for his examination there, so that it is not averred that his competency for this bursary involved him in any outlay. If the fact that he was defeated in the competition is to be dealt with as a matter of loss, it is not very easy to see how such a loss is to be estimated. For my part, I am inclined to view the matter differently. I think that the pursuer not only was not a loser by this examination, but that he was a gainer. He came out well, and passed a good examination when opposed by an admittedly able competitor, and in such circumstances I cannot see that the claim of damages which the pursuer here tries to rear up is one which we can in any way recognise, and I am therefore for adhering

to the interlocutor reclaimed against.

LORD SHAND—I am entirely of the same opinion. There was no contract in this case between the defenders and the pursuer by which he acquired any right to this bursary, and so any action founded on such a supposed contract must fail.

Upon the question of damages there is no specific averment on record of the damage which the pursuer is said to have suffered, nor is it suggested that he has sustained any pecuniary loss from anything which has taken place, beyond his not being the successful candidate and securing the bursary, a matter for which the respondents cannot in any way be made responsible.

LORD ADAM and LORD M'LAREN concurred.

The Court adhered.

Counsel for the Pursuer—M'Kechnie—Lyll. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders—Low—D. Robertson. Agents—J. & F. Anderson, W.S.

Tuesday, June 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.]

MACDONALD v. THE REFUGE ASSURANCE COMPANY, LIMITED.

Life Insurance—Death by Accident—Drowning—Presumption against Suicide.

A man insured his life with an assurance company upon a policy which bore that "the full sum assured shall become payable if the assured shall die from accident happening at any time after the date of this policy," . . . and required "on the death of the assured . . . if the claim is made on the ground of death by accident, satisfactory evidence of the accident." The assured was found drowned in the Clyde, but there was nothing to indicate how he had fallen into the water. In an action in the Sheriff Court at the instance of the deceased's executrix to recover the sum assured for, the company declined to pay on the ground of the pursuer's failure to produce any proof of accidental death. After a proof, which failed to throw any light on the matter, the company were assoilzied by both the Sheriff-Substitute and the Sheriff. The Second Division upon appeal held that the assured was accidentally drowned, and decerned against the company for the amount sued for.

The late Archibald Boyd, by policy of assurance dated 6th June 1887, insured his life for £50 with the Refuge Assurance Company, Limited, Glasgow. The policy provided—"Number one of said conditions is as follows:—'The full sum assured shall become payable if the assured shall die