Friday, Oct. 24.

[Perthshire.

SKEETE *v.* DUNCAN.

Trustee—Beneficial Interest—Direction to Sell.

A trustee left a certain portion of the rents of his estate to his widow during her life, the remainder to one of his trustees; and after the widow's death he directed that the subjects should be sold. *Held* that this did not make the right of the trustee a moveable one, so as to disqualify him.

This case was an appeal at the instance of Mr Horace Skeete (mandatory for Mr James Miller senior) against James Duncan. It was objected that Duncan was not joint-proprietor of the subjects on which he claimed, in the sense of the statute. The Sheriff repelled the objection.

It was stated for the appellant that the claim was made on certain subjects that had been conveyed in trust. The claimant was one of the trustees of the subjects in question, having himself a beneficial interest, which consisted, in the first place, of receiving his proportion of the rents so long as the trust subsisted. After the trust came to an end, the trust-estates were to be sold. If the claimant wished to retain his part of the trust, whether as a house or otherwise, the trustees had it in their power to consent to his request. It was contended that under such a trust-disposition Duncan's was a moveable interest. He was not proprietor of any subjects at all, but a mere beneficiary, having a personal right in the trust-disposition, and not a proprietor in the sense of the Reform Act.

LORD BENHOLME—This is a case which turns upon a very narrow point of law. The qualification is founded upon the conveyance of a trust, and the subject is quite sufficient, provided that the party, who is one of the trustees, and has a beneficial interest in it, is entitled to hold himself out as in possession, or as joint-possessor, of a heritable subject. It was said that the trust-deed authorised the trustees to realise the subjects by selling them, and that consequently they retain no longer that heritable character. But it is only on the death of the widow of the testator that they are entitled to sell, and she may outlive them all. I think, in the circumstances, that the Sheriff has done right in repelling the objection.

LORD ARDMILLAN—This is a case which has been very ably argued. We have repeatedly recognised as a sufficient qualification the right to the rents of a heritable subject held in trust, and those seeking qualification here are beneficiaries to whom rents are due. There is undoubtedly a direction to sell the estate after the widow's death: but we are not dealing with a question of succession. We are here in a question of registration upon an existing qualification, and at this moment the subjects are unsold, and still heritable. Those who are seeking qualification are beneficiaries to whom those rents are due. The time has not come, and I do not know that it ever will come, when the trustees ought to sell. I cannot anticipate that matter, and find those persons not entitled to a qualification on speculation as to a time that may occur.

LORD ORMIDALE—It appears to me that the interest of the beneficiaries is of a moveable nature; but looking at the matter as affecting a right to the franchise, I think there is enough to enable me to concur with your Lordships that the claimant should be admitted to the roll.

The decision of the Sheriff was affirmed, with expenses.

Appellant's Counsel — Scott. Agents — John Galletly, S.S.C., and Horace Skeete, solicitor, Perth.

Respondent's Counsel—Alison. Agents—T. F. Weir, S.S.C., and Thomas, solicitor, Perth.

COURT OF SESSION.

Tuesday, October 28.

SECOND DIVISION.

[Lord Gifford, Ordinary.

GORDON *v.* ROBERTSON.

Reparation—Mora—Taciturnity—Proving of Tenor.

In an action of damages, brought at an interval of seven years, for wrongous apprehension, the pursuer averred that he had been imprisoned on a bill, notwithstanding a letter of protection from the defender. This letter was not produced, and was alleged to be missing.

Held that there was no relevant ground of action, there being nothing specific on record as to the missing document.

Observed (*per* Lord Cowan), that an action of proving the tenor is an essential preliminary to any action on a lost document.

This case came up by a reclaiming note against an interlocutor of the Lord Ordinary (GIFFORD) of date June 5, 1872, adjusting an issue, which, as amended, was as follows:—"Whether, on or about 23d September 1865, the defender wrongfully apprehended and incarcerated the pursuer, or wrongfully caused the pursuer to be apprehended and incarcerated, and thereafter wrongfully detained the pursuer, in virtue of diligence against the pursuer at the instance of James Chalmers, shoemaker, Insch, and that after the defender had undertaken to supersede all diligence against the pursuer on the said diligence, to the loss, injury, and damage of the pursuer? Damages laid at £1000." The action was at the instance of William Gordon, joiner in Aberdeen, against George Allan, advocate there, and James Robertson, accountant, Insch. The pursuer set forth that a bill for £50, which he had granted to a man named Chalmers, had been in reality held by Chalmers for behoof of Robertson, whose agent, he alleged, Allan was. Gordon was arrested on their diligence done upon the bill, and was liberated on condition of his promising to go back to prison if he failed to pay the amount of the bill within so many days. Before the expiration of that time, according to his statement, he arranged with Robertson to settle the bill on which he had been arrested by the acceptance of a new one in Robertson's favour, Robertson thereupon writing to Allan that the bill had been settled, and instructing him not to proceed further in the matter. Nevertheless, Allan caused Gordon to be arrested on the old bill. The defenders denied that any such agreement was come to or instructions given, or that Robertson acted in any other character than as agent of Chalmers. Upon this diligence Gordon was se-

questrated at his own petition, and he set forth Chalmers as a concurring creditor in virtue of the bill, which the pursuer said he had retired. In his state of affairs, too, he gave Chalmers as a creditor on the alleged retired bill. A dividend of 18s. per £ was paid from the pursuer's estate to the ranking creditors, and he ultimately got his discharge without composition under the sequestration. The sequestration occurred in September 1865, and this action was raised in February 1872.

The pursuer pleaded—"(1) The apprehension and detention of the pursuer having been in the circumstances wrongful and illegal, the defenders are liable in damages to the pursuer. (2) The pursuer having, through the foresaid wrongful and illegal proceedings, sustained loss, injury, and damage to the extent libelled, is entitled to decree against the defenders in terms of the conclusions of the summons, with expenses."

The defender James Robertson pleaded—"(1) The pursuer having been sequestrated and not retrocessed in his estate, has no title to sue the present action. (2) The pursuer is barred from insisting in the present action in respect of the sequestration of his estates and proceedings therein. (3) The present action is, in the circumstances, barred by *mora*, taciturnity, and acquiescence. (4) The statements and pleas of the pursuer are irrelevant, and the defender ought to be assoilzied. (5) The statements of the pursuer, so far as the defender is concerned, being unfounded in fact, and his pleas untenable in law, the defender ought to be assoilzied, with expenses."

The pursuer allowed the defender Allan to be assoilzied, and the Lord Ordinary thereupon issued the interlocutor which was reclaimed against.

Authorities:—*Drummond* v. *Drummond*, 7 W. and S. (H. of L.); Dickson on Evidence, § 1291, § 1296.

At advising:—

Lord Justice-Clerk—This case is one which has raised certain questions attended with some difficulty. The foundation of the action is a wrongous apprehension of Gordon, the pursuer, in 1865, and the action itself is not raised until the year 1872, or no less than seven years later. On behalf of the pursuer it has been maintained that the real creditor was the defender Robertson, but he, on the other hand says he had nothing to do with the transaction at all, except in the character of agent for Chalmers. [*His Lordship here proceeded to quote the statements in Art.* 4 *of the condescendence.*] The pursuer further avers, that notwithstanding the terms of the letter of protection Robertson proceeded to put him in jail—(*Art.* 6). My Lords, it is maintained that this is a relevant statement, and I do not say that in the abstract it is not so, but there is in it disclosed a letter; that letter is nowhere to be found, we have no knowledge from evidence of any kind what its contents were, and any statements on this matter that are before the Court are extremely vague and unsatisfactory. As to the precise terms of the letter, it would be necessary to have a specific allegation. I am not prepared to say that these statements might not be proved by parole evidence without a proving of the tenor, but that matter I should not desire to decide. On the face of this record it is clearly a case that should not be sent to trial at all. It is evident this debt was settled under the sequestration in 1865, in which the pursuer paid 18s, in the pound, It has been stated to us that there might be a foundation for an action for wrongous apprehension even without this document, but the general view I am disposed to take of this action is that being raised on the footing of a written document which has disappeared, it is essential for your Lordships to have before you statements of the most specific nature, (1) as to the very terms of the letter which has disappeared, and (2) as to how that disappearance took place without any attempt at the recovery of the lost document.

As to the question of title, it is another matter; I am for dismissing the action.

Lord Cowan—The circumstances in this case are very remarkable and special. I feel it a duty to apply to the record the strictest principle of construction in order to ascertain the foundation of the action, and that I find it impossible to do without discovering the basis of everything to be the breach of the obligation not to take action on the bill, an obligation contained in that missing letter. That letter being thus the very foundation of this action, on that ground alone I am satisfied there is no relevant basis for action on this record. I have always understood, and I am still entirely of opinion, that an action of proving the tenor was an essential preliminary to any proceedings on a document which had been lost, or of which the terms had been left unproven, and I have no hesitation in thinking that this action ought to be dismissed, and not sent to a jury.

Lord Benholme—As the record stands, I think we should not affirm the interlocutor until the party has either proved the tenor or given us a statement that he is not prepared to do so.

Lord Neaves—I think we should dismiss. The pursuer comes here and tells us that Chalmers was not his creditor in 1865. In the sequestration he swore he was so. Then next he tells us that Robertson, being the true creditor, granted him a letter to protect him against the diligence, but we have no evidence of this, and the letter is not forthcoming. One thing is certain, that Gordon, the pursuer, got his discharge from bankruptcy in 1865 on giving up to his creditors the whole of his assets whatsoever.

I cannot conceive an action brought under more unfavourable circumstances, or giving rise to a more personal bar than the present.

The Court dismissed the action, with expenses.

Counsel for Pursuer (Respondent)—Trayner and J. A. Reid. Agents—Philip, Laing & Monro, W.S.

Counsel for Defender (Reclaimer)—Millar, Q.C Mair and Gibson. Agent—Wm Officer, S.S.C.

I., Clerk.

Wednesday, October 29.

SECOND DIVISION.

JAMES BROWN & CO., *v.* THE DUKE OF BUCCLEUCH, &C.

River—Pollution—Interim Interdict—Remit.

Interim interdict was applied for and granted by the Lord Ordinary against a certain millowner, said to have polluted a stream. The defender boxed a minute setting forth the im-