Counsel for the Pursuers—W. Campbell, Q.C.—Clyde. Agents—Davidson & Syme, W.S.

Counsel for the Defenders—Guthrie, Q.C. —Chisholm. Agents—Wallace & Begg, W.S.

Friday, November 24.

SECOND DIVISION.

[Sheriff of Lanarkshire.

SOMERVILLE *v.* SUTHERLAND.

Reparation — Wrongous Apprehension — Arrest in Court—Perjury — Arrest without Warrant.

Pursuer averred that at the close of a prosecution in a Police Court in which he gave evidence as a witness, he was apprehended on a charge of perjury by instructions of the defender, who was a police superintendent and acting procurator-fiscal in the Police Court; that the perjury with which he was charged was said to have been committed during his cross-examination in the said prosecution by the defender; but that the defender in causing his apprehension acted without a legal warrant or the instructions of the presiding magistrate *Held* that such apprehension was illegal.

Opinion (*per* Lord Young) that apprehension on the charge of perjury without a legal warrant is illegal.

On 18th November 1898 John Somerville was tried at the Northern Police Court, Glasgow, on a charge of assault and was acquitted. He afterwards raised this action in the Sheriff Court at Glasgow against the acting procurator-fiscal in the Northern Police Court, Donald Sutherland by name, in which he claimed £250 damages, in respect that the defender had at the conclusion of the trial in the Police Court illegally caused the pursuer's apprehension on a charge of perjury. The circumstances in which the alleged apprehension took place were stated by the pursuer to be as follows:—At the close of the prosecution Somerville tendered himself as a witness, and was examined by his own law-agent, and cross-examined by the acting procurator-fiscal. In the course of his cross-examination, and whilst the pursuer was still in the witness-box, the defender falsely and calumniously charged the pursuer with swearing falsely and committing perjury, and ordered two of his subordinate officers to apprehend the pursuer there and then.

He was not, however, at once apprehended; but when his evidence was finished and the magistrate had intimated that he found the charge not proven, the pursuer was thereupon, on the instructions of the defender, who had no warrant or other authority, apprehended by the said officers, removed from the Court, and lodged by them in the police office. The pursuer was detained in custody for about half-an-hour, when the defender, being unable to formulate any charge against him, ordered the pursuer's liberation and he was liberated accordingly.

The pursuer further averred that the arrest was absolutely unjustified, and the defender in arresting him acted recklessly, maliciously, and without probable cause. The pursuer is a law-abiding subject, and holds a licence from the Magistrates of Glasgow as a 'bus driver. As such his residence was well known to the defender. Further, he was at the time before the Court under citation upon a complaint which fully set forth his name and place of abode, and there was not the remotest probability of his fleeing from justice.

The pursuer pleaded—"(2) The defender having illegally, unwarrantably, maliciously, and without probable cause apprehended the pursuer, or caused him to be apprehended, on a charge of perjury, is liable to the pursuer in reparation for the loss, injury, and damage thereby sustained by the pursuer."

The defender pleaded—(2) "The actings of the defender having been *in bona fide* and in discharge of his public duty as procurator-fiscal, those actings were privileged. (3) The pursuer having, as matter of fact, committed perjury when being examined before a competent court as a witness in his own behalf, has no claim against the defender."

The Sheriff-Substitute pronounced the following interlocutor—Finds that the defender, in ordering the pursuer's apprehension on the 18th November 1898, after the police charge against him had on that day been dismissed by the magistrate, was privileged, and being privileged, that there are no relevant averments of malice and want of probable cause libelled against the defender: Therefore sustains the first plea-in-law stated for the defender, dismisses the action, and decerns: Finds pursuer liable in expenses," &c.

Note.—"At the outset of the debate pursuer's agent stated that what may be described as a charge of slander in the fifth article of the condescendence he did not press, but confined himself entirely to a claim of damages for illegal apprehension. Defender, it appears from the statements and admissions of parties, was the acting fiscal in the Northern Police Court in Glasgow on 18th November last, when pursuer was charged with assault on a tramway conductor. The case was found not proven and dismissed, but the defender thereafter ordered pursuer's apprehension on a charge of perjury, and he was taken into custody for a few minutes—defender says five, and pursuer says twenty. It may be doubted whether defender acted with discretion and common sense in ordering pursuer's immediate apprehension, but that is one question, and the question which has to be determined here is another. The pursuer contends that the apprehension was made without warrant. The defender unquestionably was acting as fiscal, and he says—and there is no reason to disbelieve him—that he heard pursuer swearing that he had not a shilling in his possession, and

there was evidence before him that pursuer had a shilling in his possession, and knew that he had a shilling in his possession, and nevertheless swore to a contrary effect. It was in these circumstances that the defender ordered pursuer's apprehension, and if the case is one of privilege and arising out of official duties, it is, I think, clear that special malice requires to be averred, supported by facts and circumstances from which special malice may be deduced—*Innes* v. *Adamson*, 17 R. 11. Now, here the defender had been acting as fiscal in a case in which he thought the pursuer had committed perjury. I incline to think that a fiscal would probably fail in his duty, if acting as public prosecutor, and believing that justice had been frustrated by perjury committed by any witness (and pursuer, though accused, was in no position better than any other witness) if he did not see that the case was investigated on a charge of perjury. It would perhaps have been more judicious to have applied for a warrant for his apprehension, but I hold he was legally entitled to order his apprehension, if he believed, and had reasonable grounds for believing, that perjury had been committed. The case was subsequently reported to the procurator-fiscal for the county, and the charge it appears was not taken up by Mr Hart, the explanation being that he considered the alleged false oath 'that he had not a shilling in his possession' was not pertinent to the issue of assault in the police court. I hold, then, that the defender in this case is entitled to plead that the action is irrelevant, in respect that in ordering the pursuer's apprehension he was acting in his official duty, and there is no averment of special malice. I may add that defender is a police superintendent, and I am also of opinion that a police superintendent who *bona fide* believed that perjury had been committed in his presence, and had ordered the apprehension of the supposed perjurer, would also be entitled to plead privilege in an action brought against him on the ground of illegal apprehension."

The pursuer appealed to the Court of Session, and argued—A relevant case is averred. The act of the defender was illegal in itself. The necessity for a warrant is a question of circumstances—*Peggie* v. *Clark*, 7 Macph. 89; *Leask* v. *Burt*, 21 R. R. 32; Hume, ii. 76. In the circumstances of this case a warrant was necessary before apprehension could take place. There is no case in the books where a person was apprehended on a charge of perjury without either a warrant or instructions from the presiding judge. If the apprehension was not itself illegal, facts and circumstances are stated sufficient to infer malice.

Argued for the defender—The defender was acting in the combined capacities of procurator-fiscal and police constable. As a constable he was by common law entitled to arrest a man committing a crime in his presence—*Morton* v. *Duncan*, 24 R. 747; *Beaton* v. *Ivory*, 14 R. 1107. Further, the Glasgow Police Act 1866 (secs. 88, 99, 100, 107, 108, and 122) gives power to do what was done in this case. Assuming there was no absolute illegality in the act done, there is no relevant averment of malice and want of probable cause.

LORD JUSTICE-CLERK — The pursuer in this case moved for a proof, and I think he is entitled to an opportunity of proving his case. His case is a remarkable one—I think an unprecedented one. A witness was in the witness-box, and according to the allegation of the pursuer the procurator-fiscal ordered him to be apprehended as he left the box in consequence of his being dissatisfied with certain answers which were given to questions. I think it would be deplorable if any practice arose of such treatment being applied to witnesses. A witness might be being examined in a criminal trial before a jury, and under such a practice the prosecutor might have a constable standing opposite the witness for the purpose of being ready to apprehend him if he were thought to be giving answers to a particular effect. No one could tell what prejudice there might be to the interests of justice or to the witness, who, though honest, might make a very bad appearance in consequence of the dread of being apprehended on the spot in consequence of his answers. In the present case, at all events, there can have been no cause for any such proceeding. The pursuer was resident in Glasgow, and his address in Glasgow was known, for he had been cited to attend the Court on the day in question, and appeared in answer to the citation. Even if an occasion had arisen for taking steps to apprehend him as having given false evidence, the magistrate was sitting in Court at the time, and it is impossible to see why he should not have been asked to grant a warrant to apprehend. He and not the prosecutor was the proper judge of what should be done if it were thought that the conduct of the pursuer as a witness in the trial before him required such proceedings. At this stage we are only concerned with what are the averments of the pursuer. I think that having regard to the nature of these averments, which may or may not be established, the proper course is to recal the interlocutor of the Sheriff-Substitute, and to remit the case to him with instructions to allow a proof before answer.

LORD YOUNG—I am of the same opinion. I do not think the police-constable or police superintendent is at liberty without a warrant to apprehend a man for perjury, whether in court or out of court. Whether in court or out of court I think the case is the same. It is more inexcusable in court, because the magistrate is there, and is competent to cause a legal apprehension if the case seems to require it, and he may be applied to for a warrant on the spot. That is the reasonable and proper course.

The pursuer was apprehended, not upon an emergency as a pickpocket or robber committing a crime on the street. In such a case a police constable may apprehend

on the spot, or even a private citizen may interfere to safeguard justice and stop a crime. These cases are provided for by the common law, and by many Police Acts too. But the case of perjury committed in the hearing of a police constable is without the region of these cases altogether. Even if the man were absconding or running away, that does not justify the apprehension without a warrant. The police constable must in that event watch the man, or follow him to the place where he goes to in order that apprehension with a warrant may take place. According to the averments on record, which the pursuer may prove, this is a plain case in which the police constable was not entitled to apprehend the pursuer without having first obtained a warrant or other authority.

LORD TRAYNER—I concur. I should be slow to say anything which might hamper a police constable or a procurator-fiscal in the discharge of his duty. At the same time we must be careful to protect private persons against the assumption on the part of these officials of an authority which the law has not given them. Assuming, as at this stage we are bound to do, that the pursuer can prove his averments, the proceedings of the defender appear to me to have been high-handed and unwarrantable.

LORD MONCREIFF—I agree that the pursuer has stated a relevant case for inquiry.

The Court recalled the interlocutor appealed against and remitted to the Sheriff to allow a proof.

Counsel for the Pursuer—Watt—Monro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender—Shaw, Q.C.—Lees—Spens. Agents—Campbell & Smith, S.S.C.

Friday, November 24.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

THE LONDON AND MIDLAND BANK, LIMITED *v.* FORREST.

Cautioner—Letter of Guarantee—Breach of Conditions of Guarantee—Extinction of Obligation.

By letter of guarantee dated 9th February 1898, Peter Forrest and Robert Sneddon bound themselves, jointly and severally, and their heirs, executors, and representatives, to pay the London and Midland Bank, Limited, £1000, with interest at 5 per cent. per annum from the date thereof, "on condition that no payment of said sum of principal or interest is demanded by said bank before two calendar months from the date hereof; this letter of guarantee and the payment thereunder being in satisfaction of a bill, dated 28th September 1897, for the sum of One thousand pounds, now overdue, drawn by Accles Limited and accepted by the Glasgow Trust Limited, any sum received on account of said bill being held to be in part satisfaction of this guarantee."

Accles Limited were due the bank a large sum on account-current, and among other securities for the advance they had lodged with the bank the bill in question.

Within two months from the date of the guarantee the bank sued Accles Limited for the balance due by them on their current account.

Held that this did not constitute a breach of the condition of the guarantee.

Opinion (*per* Lord Young) that even if the bank had made a demand for payment of the sum guaranteed from the guarantors within two months from the date of the guarantee the obligation would not have been thereby extinguished.

On 9th February 1898, Peter Forrest, banker, Edinburgh, and Robert Sneddon of Hillhouseridge, Shotts, granted a letter of guarantee to the London and Midland Bank, Limited, in the following terms:—"We, Peter Forrest, banker, Edinburgh, and Robert Sneddon of Hillhouseridge, Shotts, hereby undertake and bind ourselves, jointly and severally or severally, and our respective heirs, executors, and representatives whomsoever, to pay to the London and Midland Bank, Limited, whose registered office is 52 Cornhill, London, the sum of One thousand pounds sterling, and interest thereon at the rate of five per cent. per annum from the date hereof, on condition that no payment of said sum of principal or interest is demanded by said bank before two calendar months from the date hereof; this letter of guarantee and the payment thereunder being in satisfaction of a bill, dated 28th September 1897, for the sum of One thousand pounds, now overdue, drawn by Accles Limited and accepted by the Glasgow Trust Limited, any sum received on account of said bill being held to be in part satisfaction of this guarantee."

Accles Limited were due to the London and Midland Bank Limited a large sum on current account, and in security of this sum they from time to time handed to the bank bills accepted to them by third parties, among others so delivered being the bill referred to in the guarantee.

On 8th February 1898 the bank had commenced an ordinary action in the English Courts against Accles Limited for recovery of £2601, 13s. 6d., being the balance due on the latter's account-current with them. Accles Limited entered appearance on 17th February 1898, and on 14th March an order for judgment was made in favour of the bank. Judgment, however, was never signed, although the bank was entitled to take judgment at any time.

On 13th April 1898 the bank raised an action against Forrest and Sneddon for £1000, being the sum contained in their letter of obligation of 9th February.