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.

The defenders, *inter alia*, averred that in suing Accles Limited on the overdraft the pursuers had violated the condition of the letter of guarantee, and pleaded (2) the pursuers having violated the conditions of the letter of guarantee libelled, the defenders should be assoilzied.

On 2nd March 1899 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds (1) that by the obligation dated 9th February 1898 the defenders became bound to pay to the pursuers the sum of £1000 therein mentioned; (2) that said obligation was a guarantee for payment of a bill dated 28th September 1897, for £1000 by Accles Limited, and accepted by the Glasgow Trust Limited: (3) that the defenders' obligation under the said guarantee was subject to the condition that no payment of said sum should be demanded by the pursuers before two months from the date of the guarantee; (4) that before the said period had elapsed the pursuers, in violation of said condition, raised an action against Accles Limited, which included and imported a demand for payment of said £1000; (5) that the pursuers having thus violated the condition of said guarantee are not entitled to sue for implement thereof: Therefore assoilzies the defenders from the conclusions of the summons and decerns."

Note. — "This is an action for £1000 founded on a document which is stated in the condescendence to be a guarantee for a bill for £1000 said to be drawn by Accles Limited and to be accepted by the Glasgow Trust Limited; and the defences are that a condition in the obligation has been violated, and that the pursuers have not tendered, and are not in a position to tender, any bill by Accles Limited for £1000. The obligation of the defenders under the deed founded on is express. It is to pay £1000; but the obligation is subject to this condition that no payment of said sum of principal or interest should be demanded by said bank before two calendar months from the date thereof. This is a condition which is said to have been violated; and if it has been violated, I do not understand that it is disputed the pursuers cannot enforce their obligation. The violation is said to have consisted in this, that before the two months elapsed the pursuers raised an action against Accles Limited for the debt due by that company to them on their overdrawn current account. The question is, Was that proceeding a breach of the condition that no payment of the £1000 mentioned in the guarantee should be demanded for two months. Reading the first part of the obligation only, it is nothing but an obligation by the defenders to pay £1000; and if that were the whole of the deed I would construe the condition as an obligation not to demand payment from the defenders within two months, and would hold that that condition had not been violated by proceedings against Accles Limited, but not against the defenders. But the latter part of the document discloses that the deed is not a primary obligation, but a letter of guarantee for a bill, dated 28th September 1897, for £1000, drawn by Accles Limited and accepted by the Glasgow Trust. I think the deed must be construed as if it had borne to be an obligation to guarantee payment of a bill drawn by Accles Limited and accepted by the Glasgow Trust Limited on condition that payment should not be demanded for two months. The pursuers in their condescendence say that the defenders agreed 'to guarantee to the pursuers payment of the said sum of £1000 in the said bill, with interest at five per cent. thereon, provided that no payment of said sum of principal or interest should be demanded till the expiry of two months from the date thereof.' So reading the document I think that on a sound construction of it the condition imports an obligation not to sue any of the obligants on the bill guaranteed, or to sue for payment of the debt guaranteed—that is to say, it imports an obligation not to sue either the defenders or the Glasgow Trust Limited or Accles Limited for the £1000. The question is whether this obligation has been violated. The pursuers have not raised any action on the bill, and they have not sued the Glasgow Trust Limited or (prior to this action) the defenders. But they did within the two months sue Accles Limited, but not on the bill; and the question is, whether in so suing Accles Limited they sued that firm for the £1000 mentioned in the guarantee and embraced in the bill.

"Parties are agreed that the pursuers' action against Accles Limited was an action for the amount due under their overdrawn current account; and the pursuers also say that the bill guaranteed was one of the securities for their current account delivered to them by Accles Limited. So far as it bore the obligation of the Glasgow Trust it was no doubt a proper security. It gave the pursuers a new obligant. But although bearing to be drawn for Accles Limited by their secretary, it added nothing to the obligation of Accles Limited. It only expressed in a convenient form a part of their indebtedness under their current account. The £1000 was only a part of their debt under their account-current; and therefore when the pursuers sued for payment of their account it appears to me that they demanded payment of the £1000 expressed in the bill, which was, as I have said, nothing but a part of the sum due under their overdrawn account. Suppose the debt due under their account-current had been just £1000, and that this bill had been granted in security of it, it would not in that case have been doubted that a demand for payment of the £1000 due under the current account was in reality a demand for payment of the sum in the bill, and it makes no difference that the £1000 formed only a part and not the whole of the sum due under the account-current. I am therefore of opinion that the pursuers, by suing Accles Limited for the amount in their account-current within two months after the date of the letter of guarantee, violated the condition of the

defenders' obligation and have therefore released the defenders.

"Parties seem at one on all essential points relating to this defence, and therefore I think that the case may be disposed of by sustaining this defence without a proof.

"The defenders have a further defence, which comes to this, that the bill mentioned in the letter of guarantee is not the bill of Accles Limited, and did not bind them, because their secretary had not authority to grant bills in their name. Parties are at variance as to the facts on which this defence depends, and I could not have sustained it without a proof. But parties do not seem at variance at all as to the facts on which the other defence depends."

The pursuers reclaimed, and argued—The Lord Ordinary's fourth finding that the raising of the action against Accles Limited was a demand under the guarantee was wrong and should be recalled. The bill had been lodged as collateral security for a sum due under current account by Accles Limited to the pursuers, but the action raised by the pursuers against Accles Limited was not in respect of the bill in question, and there had been no attempt on the pursuers part to operate payment of their debt out of this collateral security. Even if the sum due under the bill had been demanded from Accles Limited, that would not have invalidated the guarantee. The last sentence of the guarantee itself was inconsistent with the Lord Ordinary's judgment. It being a condition of the guarantee that any sum received on account of the bill was to be held to be in part satisfaction of the guarantee, showed that payment might be asked from other persons than the guarantors within the two months. In any event, judgment had never been signed in the action against Accles Limited, so that at present no demand had been made that could be enforced.

Argued for the defenders—It was a condition of the guarantee that no payment of the sum of £1000 should be demanded within the two months, and a violation of this condition of the guarantee would bring the guarantee to an end—*Drummond* v. *Rannie*, February 5, 1836, 14 S. 437; *Murray* v. *Lee*, July 5, 1882, 9 R. 1040; *Rolt* v. *Cozens*, 1856, 18 Scott's C.B. Rep. 673. Accles Limited being debtor of the bank, and having lodged this bill with them in security of their debt, any demand made on Accles Limited for payment of their debt would drive them back on the defenders. The condition of the guarantee implied that the bank would hold their bond absolutely for two months. Not having done this they had violated the guarantee and freed the defenders from all liability. No doubt the bank had instructed the proceedings against Accles Limited before the date of the guarantee, but the condition in the guarantee involved the cessation of any demand that had been made. Instead of that the pursuers had proceeded with their action against Accles Limited, and had by 18th March put themselves in a position to get a judgment signed so as to operate diligence whenever they desired.

At advising—

LORD JUSTICE-CLERK—The pursuers, The London and Midland Bank, sued the defenders for payment of a sum of £1000, with interest at 5 per cent., on a guarantee by them by letter dated 9th February 1898, the guarantee bearing on its face to be "in satisfaction of a bill dated 28th September 1897 for a sum of £1000, 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." The bill had been endorsed to the bank for value. This guarantee was fenced by a condition "that no payment of the said sum of principal or interest is demanded by said bank before two calendar months from the date thereof." The question in the case is whether the guarantee has fallen in consequence of a demand for payment having been made by the bank before the expiry of the two months stipulated in the guarantee. The defenders maintain that the guarantee has fallen. Their ground for maintaining that plea is that certain proceedings were taken in the English courts against Accles Limited, and that these proceedings were in breach of the condition. It is necessary therefore to consider what these proceedings were. They consisted in an ordinary action against Accles Limited, raised before the date of the guarantee, for the sum due by them on overdrafts from the bank, in which Accles & Company entered appearance, and on 14th March liberty was given to the bank to sign judgment, but judgment has never been signed. No demand for payment under the guarantee was ever made against the Glasgow Trust, the acceptors of the bill, for whom the defenders gave the guarantee, they being the true debtors in the bill. Nothing was done by way of procedure or demand upon the bill. The question therefore is, whether the action taken by the bank for the balance on account due by Accles Limited was a demand for payment of the £1000 guaranteed, which they were debarred from making by the stipulation in the guarantee for a delay of two months. The Lord Ordinary has answered that question by saying that he is "of opinion that the pursuers by suing Accles Limited for the amount of their account-current within two months after the date of the letter of guarantee, violated the conditions of the defenders' obligation and have therefore released the defenders." I am unable to concur with the Lord Ordinary in that opinion. I hold that what took place did not constitute a demand in terms of the guarantee, and therefore that his interlocutor should be recalled.

LORD YOUNG—I concur in the result that the defence is bad and that the pursuer is entitled to decree, but that not only upon the ground that the proceedings which were taken were not a demand within the meaning of this letter of guarantee at all,

but because I am also very clearly of opinion that a demand for payment would not import any destruction of the obligation. I know of no authority for such a proposition as that—that the obligation is irritated and relieved if payment is asked within the two months. I think the sense and meaning of the condition is simply that the granters are to have two months' credit, and that they are not to be made to pay till the expiry of the two months. If the pursuers had overlooked or forgotten the condition and had made demand for payment within the two months, the guarantors could have replied, "Well we have two months to pay, and you must give us these two months." But for anyone to say that the obligation is gone because payment has been demanded within the two months is to my mind an extravagant proposition. It is conceivable that the obligation might be so expressed as that it would come to an end if payment were demanded within two months. I have never happened during a pretty long experience to have seen any such, but it is quite conceivable that it might be. But a condition in terms like the present, that there is to be no demand for payment within two months, or any period you choose to mention, does not import an extinction of the obligation if the demand is made, but merely that the demand is not to be made till the period of two months or whatever it is is out. I am therefore of opinion that the defences ought to be repelled, and the pursuers be found entitled to decree with expenses.

Lord Trayner—I concur, of course, in the view that the granter of a cautionary or any other obligation which is granted under conditions can only enforce the obligation if he has observed the conditions attached to it. But granting this, I am unable to see why the pursuers should not be entitled to enforce the obligation on which this action is founded.

The obligation in question taken by itself might fairly enough be read as an absolute obligation on the defenders, the granters of it, to pay to the pursuers the sum of £1000 on condition that no demand for payment of that sum or interest was made before two months after its date. It is not in its terms a cautionary obligation at all, for the reference with which it concludes to a certain bill might be regarded as nothing more than imposing a restriction on the ulterior general character of the obligation to the effect that any payment to account of that bill should be taken as equivalent to a payment to account of the sum which the defenders bound themselves to pay.

But the pursuers aver that the obligation given by the defenders was a guarantee that they would pay the bill referred to, with interest, provided no demand was made on the obligation or on the bill for a period of two months from the date of the obligation. I therefore take the pursuers' own view of the defenders' obligation, and doing so, I think it clear that the pursuers' present claim cannot be resisted, because they have observed the condition on which the obligation was granted. No demand was made by them on the defenders nor on the acceptors of the bill (for whose credit and in whose interest the defenders interfered) in respect of the obligation or the bill, within the prescribed time. It is said, however, that the pursuers made a demand within two months on the drawers of the bill, and I assume this to be true. But it was not a demand on the bill—it was a demand for payment of a debt due to them independently of the bill and in security of which only they held the bill. There was no attempt on the pursuers' part to operate payment of their debt out of the collateral security for it which they held.

Lord Moncreiff — The only question which we have to decide at present is whether the pursuers have violated the conditions on which the defenders gave their guarantee, with the result that the defenders are liberated from it.

It is to be observed that the defenders interposed their guarantee, not in the interests of Accles Limited but in the interests of The Glasgow Trust Limited, who were acceptors and the true debtors on the bill, and therefore *prima facie* the meaning of the condition is that no demand for payment should be made on The Glasgow Trust Limited, or upon the guarantors, before two months from the date of the guarantee. If such a demand had been made, it would, I think, have constituted a breach of the condition, although not followed up within the two months by diligence or action. But admittedly no direct demand has been made upon either of these parties.

It is said that a demand for payment of this money was made within the two months on Accles Limited. But the defenders did not interpose their credit for Accles Limited, and on the other hand they could not have prevented Accles Limited from paying their debt to the pursuers in full and re-acquiring the bill, on which they might have sued the Glasgow Trust Limited.

In these circumstances I am of opinion that the pursuers have not violated the condition in the guarantee, and that the interlocutor of the Lord Ordinary should be recalled, the second plea for the defenders repelled, and the case remitted to the Lord Ordinary to dispose of the question which remains.

The Court recalled the interlocutor reclaimed against, repelled the second plea-in-law for the defenders, and remitted the case to the Lord Ordinary to proceed.

Counsel for the Pursuer—Salvesen, Q.C. —Clyde. Agent—F. J. Martin, W.S.

Counsel for the Defenders — Johnston, Q.C. — M'Lennan. Agents — Alexander Morison & Company, W.S.