

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Preliminary Objection to the Appeal of the Bank of New South Wales v. Ouston, from the Supreme Court of New South Wales; delivered Tuesday, 18th February 1879.*

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Present:

SIR JAMES COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT COLLIER.

IN this case an objection has been made to the leave granted by the Supreme Court of New South Wales to appeal to Her Majesty on the ground that the sum involved is below the appealable amount. By the Order in Council of the 13th November 1850, which regulates appeals from the Supreme Court of New South Wales, an appeal is given from any final judgment, decree, order, or sentence of the Supreme Court, subject to certain regulations and limitations, the first being that such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of 500*l.* sterling.

In the present case the action was for malicious prosecution, and the damages were laid at 5,000*l.* On the trial the jury found a verdict for the Plaintiff, with 500*l.* damages. A rule nisi was applied for to set aside that verdict, which was granted, but upon argument discharged by the Court. The rule was discharged on the 12th March 1877, and on the 13th the judgment, which is to be found at page 62 of

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the Record, was entered. The judgment so signed was as follows: "Judgment after verdict for the Plaintiff, damages 500*l.*; interest on the above amount from the date of verdict, 15th May 1876, to date, 33*l.* 1*s.* 11*d.*; taxed costs, 317*l.* 12*s.* 10*d.*"

It is plain from previous decisions of this tribunal that the costs may not be added to the amount recovered in estimating the appealable sum; and it is now contended at the bar that interest on the sum awarded by the verdict ought not to be added. Their Lordships, however, think that interest under the laws existing in New South Wales is to be considered in estimating the amount. Interest on a verdict is given by the statute, 24th of Victoria, No. VIII., the first section of which enacts that—  
 "Every Plaintiff who shall hereafter obtain a verdict in an action in the Supreme Court, upon which he shall hereafter obtain judgment, shall be entitled to interest at the rate of eight per centum per annum on the amount of such verdict from the time of obtaining such verdict until the time of entering up judgment thereon, and the amount of such interest shall be included in the judgment." The interest therefore is payable upon the amount of the verdict from the time of obtaining it until the time of entering up the judgment. It is to be included in the judgment, and forms part of it.

What, then, is the sum "in issue," to use the words of the statute, in the present appeal? The verdict is only a step towards the judgment. The sum cannot be recovered upon the verdict, but is recovered in execution upon the judgment. The foundation of the judgment is the verdict, and the rule that was obtained to set aside that verdict must be understood as involving the whole sum which the verdict would

carry, and which would be included in the judgment. That sum is not the original sum only, but, by virtue of the statute, that sum and interest.

A similar question was before this tribunal in certain appeals from India, and the judgment given on it will be found in 8th Moore, I. A. The part which is material is at page 168. "Where the appeal is from the whole decree, and the decree has given an amount, including interest up to the date of the decree, which exceeds Rs. 10,000, it is clear that the matter which is in dispute in the appeal must exceed the sum of Rs. 10,000; for the question to be tried upon the appeal must be whether the decree is or is not right; that is to say, whether the decree has or has not properly ordered payment of a sum exceeding Rs. 10,000. Where, therefore, at the date of the judgment the sum which is recoverable under the decree of the Sudder Court is an amount exceeding Rs. 10,000, there, in their Lordships' judgment, the case clearly falls within the terms of the Order in Council." In the same judgment their Lordships state that they "must not, of course, be understood to intimate that the Sudder Courts ought to give leave to appeal in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree." Here their Lordships think that the sum involved in the judgment appealed from does exceed, for the reasons they have stated, the sum of 500*l.*, and they are therefore of opinion that the appeal ought to proceed.

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*The following is the Judgment in this Appeal delivered by the Lords of the Judicial Committee on the 28th day of March 1879.*

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THIS is an action for a malicious prosecution brought against the Bank of New South Wales, an incorporated company.

The circumstances leading to the prosecution, which it is now admitted was groundless, are the following :—

In March 1876 a bill at 30 days sight for 1,500*l.* was drawn by Messrs. Morgan, Connor, and Glyde, a firm trading at Adelaide in South Australia, upon the Plaintiff Mr. Owston, a merchant trading at Sydney under the firm of Owston & Co. The bill was drawn against a consignment of wheat shipped on board the Sea Gull, and was sent with the shipping documents by the Adelaide branch of the Defendants bank to the head bank at Sydney.

On Saturday the 18th March the bank left the bill with the Plaintiff for acceptance. He wrote his name upon it, but it was not called for until the morning of Tuesday the 21st. Meanwhile, on the afternoon of Monday the 20th, the Plaintiff had received the following telegram from the drawers : “ Sea Gull put back leaky ;” and on the same afternoon he telegraphed in reply, “ Do you wish us to accept draft, or will you instruct extension of 60 days ?” On the morning of Tuesday the 21st, about 11 o'clock, a clerk from the bank called for the bill, and the Plaintiff showed him the telegrams. He did not give the bill to him, but sent a clerk to the bank to explain the matter, and it was arranged that the bank should wait until one o'clock for the return of the bill. About that hour, and before the Plaintiff had received an answer to his telegram, he returned the bill to the bank, having previously cancelled his

acceptance. In the afternoon of the same day the following telegram from Adelaide reached the Plaintiff: "Bank instructed extend draft to 60 days." A telegram to the same effect was received by the bank.

The bill, when returned to the bank by the Plaintiff, was sent on the same afternoon by Hobbs, one of its clerks, to Messrs. Allen, Bowden, and Allen, who are notaries, and also solicitors of the bank, to be presented by them for noting, and what took place with respect to this presentment produced the misunderstandings which led to the prosecution complained of.

On the following day, Wednesday the 22nd, a clerk of Messrs. Allen and Bowden, a lad called Muir brought the bill to the Plaintiff for acceptance. The Plaintiff's evidence is to the effect that he understood the lad to be one of the bank clerks, and having in his mind the telegrams as to the alteration of the days of sight, he inquired of him how the bank wished the acceptance to be. The clerk said he knew nothing about that. The Plaintiff then told him that he would accept the bill and send it round to the bank, and it was left with him. Shortly afterwards Bishop, another clerk of Messrs. Allen and Bowden, came for the bill, and demanded to have it returned. According to the Plaintiff's evidence, he was not aware that Bishop was other than a bank clerk. He says that he again inquired how the bill was to be accepted, and told Bishop he would accept and send the bill to the bank. He says Bishop behaved in a violent manner and declared that he should treat what he had said as a refusal to return the bill. The Plaintiff's account of these conversations is contradicted, but for the purpose of this general statement may be assumed to be correct. The Plaintiff in fact soon after sent the bill to the bank accepted, having first made it payable at 60 days sight, and

it appears to have reached the bank about one o'clock.

Unfortunately the fact of the return of the bill was not communicated by the bank to Messrs. Allen and Bowden, as it ought to have been, and they remained under the impression that the Plaintiff was still keeping it in his possession. Another interview took place between Bishop and the Plaintiff; they met in the street. The Plaintiff declined to have anything to say to Bishop, and unfortunately did not tell him what would have prevented further trouble,—that the bill had been sent to the bank. Bishop said, on parting, that he would go for the police. A consultation was held in Messrs. Allen and Bowden's office, and apparently, on the assumption that the Plaintiff was improperly withholding the bill, and that they as notaries were responsible to the bank for its return, it was resolved to take criminal proceedings. Bishop and Muir then went to the police magistrate and applied for a warrant to apprehend the Plaintiff on the charge of stealing the bill. The magistrate refused to grant a warrant, but issued a summons to the Plaintiff to appear on the next day to answer a charge of feloniously stealing a bill of exchange of the value of 1,500l., the property of the bank. The information was laid by Muir. As soon as he was served with the summons, the Plaintiff went to the bank, and after inquiring for the general manager, who was engaged, saw Mr. Wilkinson, the acting manager, and complained to him of the course which had been taken. There is great conflict of testimony as to what occurred at this interview, but an explanation then took place, and there seems no doubt that after the interview it was resolved not to press the charge. Application was made by the solicitors to the magistrate to be allowed to withdraw it, which was refused, and upon the case being called on the next

morning, the plaintiff being present in obedience to the summons, no evidence was offered in support of the charge, and the case was dismissed.

The Plaintiff then brought the present action against the bank.

On the trial Mr. Justice Manning properly held that the prosecution was without reasonable cause, and it was found by the jury to have been commenced from improper motives, and was therefore malicious. No question now arises on this part of the case.

The two questions which were mainly contested at the trial and argued at their Lordships' bar are: (1) whether the proceedings of Messrs. Allen and Bowden were authorised by Wilkinson on behalf of the bank; and (2) if they were, whether the bank was responsible for Wilkinson's acts. At the trial the jury specially found the first question in the affirmative. Upon the second question, the learned Judge told the jury, according to his own statement of his direction, "that it was to be inferred from Mr. Wilkinson's position as manager that he had sufficient power under the circumstances for directing a prosecution," and the verdict passed in accordance with this ruling.

A rule nisi to enter a nonsuit or for a new trial was granted on the following grounds:

1. That the special finding of the jury (that Mr. Wilkinson authorised the prosecution) was against evidence, and had no evidence to support it.

2. That the Judge was in error in directing the jury that the acts of Mr. Wilkinson, the acting manager, were, as regards the prosecution, the acts of the bank for which the bank was responsible.

3. That there was no evidence that the prosecution was in fact or in law a prosecution by the bank.

This rule, after an argument before the Chief

Justice, Mr. Justice Hargreave, and Mr. Justice Manning, was discharged. The Court was unanimous in refusing to disturb the finding of the jury as to Wilkinson having authorised the proceedings; but on the question of the correctness of Mr. Justice Manning's ruling as to the responsibility of the bank for his acts, which that learned Judge and Mr. Justice Hargreave sustained, the Chief Justice dissented from his colleagues.

One point argued in the Court below was that the bank, being a corporation, could not in any case be liable to an action of this kind. The Chief Justice (the other Judges taking the opposite view) held the law to be so, to use his own words, "on the plain ground that malice " being a state of mind, cannot be attributed to a " corporation which has no mind," and he relied on the judgment of Baron Alderson in *Stevens v. The Midland Counties Railway Company and Lander*, 10 Ex. 352, which, as reported, no doubt supports this view.

The learned counsel for the Appellant (Mr. Benjamin) acknowledged that, after recent decisions, he could not support this broad proposition, and confined his argument to the two questions above indicated.

Upon the first of these questions, evidence was given on the part of the Plaintiff of statements made by Wilkinson, in the conversation which took place when the Plaintiff went to the bank to complain of the proceedings, to the effect that he had given instructions for them. This was wholly denied by Wilkinson. It appeared that Wilkinson was at the solicitors' office on the morning of the day on which the summons against the Plaintiff was issued. But it was stated both by him and the solicitors that he was there on other business, and that whilst engaged with Mr. Bowden, Mr. Allen, who was attending



to the matter of the bill, came in and mentioned that the Plaintiff refused to give it up; upon which Wilkinson, having asked from whom he got the bill, and being told from Hobbs, the bill clerk of the bank, remarked, "You got the bill from the bank, and will have to return it; you are responsible." They all denied that Wilkinson had given any instructions to the solicitors in the matter. Their Lordships are very much disposed to agree in the view expressed by Mr. Justice Manning, "that there is a great deal of strong evidence for the Defendant to show that the solicitors acted on their own responsibility, and in defence of their own possession of the bill, in their capacity of notaries, and not for or on behalf of the bank." They cannot however say that there is not some evidence to support the finding of the jury on this question; and that finding having been sustained by the judgment of the Court below, they intimated to the learned counsel at the close of the argument for the Appellants that they should not feel justified in sending the case to a new trial upon this point, if it stood alone.

The point remaining for consideration, viz., the liability of the bank for the acts of Wilkinson, is of more general importance. The first question which arises on this point is whether the direction of the learned Judge to the jury to the effect that it was to be inferred from Wilkinson's position that he had authority to direct the prosecution—thus practically withdrawing the question from the jury—was correct, and their Lordships think that upon the evidence given at the trial it was not.

No proof was offered by the Plaintiff of the position, duties, and powers of the acting manager; but the Defendants examined him, and also the general manager, who gave the following evidence on the question of his authority:

“ Mr. Wilkinson said :

“ Mr. Shepherd Smith is general manager. I have been acting manager since August last. I have had no instructions from the board or general manager authorising me to prosecute or bring actions, nor any instructions not to do so. It is not our practice ; we go to a higher authority. I have had occasion to refer to the general manager when any occasion arose about bringing any action, or to the board. Since I have been acting manager have never taken criminal proceedings without authority of board. In a case where a man presented a cheque forged I have as accountant, and should now take proceedings to arrest where we have to catch the man on the spot, only in such a case. I should do this as acting manager or as assistant manager, accountant, or clerk.”

The following is the Judge's note of the evidence of Mr. Smith, the general manager :

“ I have heard generally of the information against Mr. Owston. I gave no instructions whatever ; had not heard a syllable about the matter. Mr. Wilkinson is acting manager. He had no instructions at all to take any criminal proceedings against anyone. Mr. Wilkinson's duties are the ordinary duties of a bank manager. The practice since I have been in the bank (22 years) has been that no such proceedings shall be taken except by express instructions of the board.

“ The board meets twice a week, ordinary and occasionally special meetings ; a special meeting might possibly\* in an hour, and possibly in two hours. In the absence of the board it would be the duty of the acting manager to take the instructions of the general manager. Allen, Bowden, and Allen have no general authority given to them expressly to take criminal proceedings unless specially instructed ; they have

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\* Sic.

no authority to bring any action or take any proceedings.

“ *Cross-examined by Mr. Stephen.*—I say practice for 20 years not to take proceedings to arrest or to summons without referring to the board. I have no direct recollection of any such case, but I think I can refer to such cases, criminal cases, in our minutes. I can recollect no case of any case of proceedings for stealing from the bank being referred first to the board, nor for forgery.

“ *By Mr. Butler.*—I got instructions once at a board meeting not to commence (stopped). I cannot say whether a single case of criminal proceedings since; I believe there have been some, but cannot recollect any one. There have been many criminal proceedings for embezzlement by officers.

“ The manager nor acting manager have not taken upon themselves to prosecute, but the board direct.

“ *Subject to Objections.*—In case of civil proceedings, the practice is to take the board's instructions before any action is commenced; that has been the practice during all my time as administrator of affairs.

“ *Cross-examined by Mr. Stephen.*—I will not say that there have not been taken on P. notes without reference to the board; may have been so; will not say there may not have been hundreds of such cases within the last 20 years, nor 5,000; very improbable, most improbable. I will not say that instructions to sue have not often been sent between board days. I will not say that in cases in which property of bank taken and in danger of being lost unless arrest ordered, action has not been taken without reference to board.

“ In such an emergency I should take the responsibility myself of violating the rule, whether it would be my duty or not.”

Before considering the effect of this evidence, it will be convenient to refer to the series of authorities cited at the bar. They all related to the liability of railway companies for wrongful arrests by their servants. In each of the two earliest cases, *Eastern Counties Railway Company v. Brown*, 6 Ex. 314, and *Roe v. Birmingham, &c. Railway Company*, 8 Ex. 36, the Plaintiff, who had been arrested at a station for refusal to pay the fare demanded, brought an action for false imprisonment. In both the question arose as to the authority of the officers at the station to make the arrest, and in both it was held there was not sufficient evidence of such authority to go to the jury. The decision in the first of these cases, upon the insufficiency of the evidence for the consideration of the jury, is scarcely consistent with later authorities. In the last of them, Baron Parke thought there was no proof that the servant "had ever received any general authority " from the company to arrest any person who " did not pay his fare, nor was there any " evidence of any course of dealing to show that, " as a servant of the company, he was authorised " to make any arrest on their behalf."

In the later cases a more particular inquiry was made into the character of the employment of the officer, whose acts were in question, and the nature of the duties entrusted to him.

In *Goff v. The Great Northern Railway Company*, 3 El. & El. 672, the Plaintiff had been arrested for travelling on the line without a proper ticket by an inspector of the company acting under the direction of the superintendent of the station. By the Railway Clauses Act, 10 Vict. c. 20., sec. 8., a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to defraud, and power is given to all officers and servants on behalf of the company to apprehend such persons. There

was evidence that the superintendent was the person in supreme authority at the station, and the jury having found for the Plaintiff, the Court refused to set aside the verdict, on the ground that there was no evidence for their consideration. Mr. Justice Blackburn in delivering the judgment of the Court, observes: "The Court  
" thought that, as from the nature of the case  
" the question whether a particular passenger  
" should be arrested or not must be made with-  
" out delay, and as the case may not be of  
" unfrequent occurrence, it was a reasonable  
" inference that in the conduct of their business  
" the company should have on the spot officers  
" with authority to determine, without the delay  
" attending on convening the directors, whether  
" a person accused of this offence should be  
" apprehended." And the Court held there was evidence for the jury that the persons who apprehended the Plaintiff had such authority, observing that it was difficult to see why the company paid the police if the inspector of their police was not to act for them to this extent.

This case turns therefore on the considerations that the summary power of apprehension given for the protection of the company could only be exercised (practically) on the spot, and instantly, and that the officers who acted were the fittest and indeed the only representatives of the company on the spot who could exercise it, and upon these considerations it was held that the jury might infer the necessary authority.

In the later case of *Edwards v. London and North Western Railway Company*, L. R., 5 C. B. 445, it was held that there was no evidence of the officer who had made the arrest having such authority. There a foreman porter who had the superintendence of the station yard in the absence of the station-master, gave the Plaintiff into custody on a

charge of stealing timber which the foreman porter suspected to be the property of the company. The timber was in a van at the station. It did not appear that any timber was in the special charge of the foreman. The Plaintiff was well known, and in fact a gateman in the service of the company. It was held that there was no evidence of implied authority arising from the foreman's position to give into custody persons whom he might suspect to have stolen the company's goods. The apprehension in this case was not in pursuance of any special duty entrusted to the servant, as to enforce laws or bye-laws. The Court recognised the distinction that in the case of such a duty, authority might under certain circumstances be presumed, but held that the general authority sought to be inferred from the position of the foreman could not be so presumed. Other decisions adopt this distinction. In *Moore v. Metropolitan Railway Company*, L. R., 8 Q. B. 36, the facts of the case were held to bring it within the authority of *Goff v. The Great Western Railway Company*.

The case of *Poulton v. The London and South-Western Railway Company*, L. R., 2 Q. B. 535, was a peculiar one. The station-master had arrested the Plaintiff for non-payment, not of his own fare, but that of his horse; the law giving power to detain only for the former. Although it appeared that the station-master acted in the belief that the law authorised the arrest, and that he was protecting the interests of the company, it was held that his act was not within the scope of his authority, since it could not be inferred that the company had authorised him to do an act which under no circumstances could be lawful, and which they had no power to do themselves.

A question in some respects similar to that decided in *Watkins v. The London and North-Western Railway Company* arose in *Allen v. The*

*London and South-Western Railway Company*, 6 Q. B. 65. It is to be observed that although in both these cases the Defendants happened to be railway companies, the questions involved in them might equally arise in the case of other masters. In the last it appeared that a clerk whose duty it was to issue tickets and put the money received in a till, which was kept under his charge, having given some money in change to the Plaintiff, who objected to one of the coins, a dispute arose, and the Plaintiff, it was alleged, put his hand into the till. The clerk thereupon seized the Plaintiff and gave him into custody, and the next morning charged him before a magistrate with feloniously attempting to rob the till. Mr. Justice Blackburn, who tried the cause, left it to the jury to say whether the clerk acted for his own ends and out of spite in consequence of the dispute, or whether he acted in furtherance, as he supposed, of the interests of his employers to protect their property. The jury found that the clerk was acting in defence of the company's property, and returned a verdict for the Plaintiff. The Court set this verdict aside and entered a nonsuit. It does not appear whether the clerk when he gave the Plaintiff into custody believed or suspected that he had actually taken any money, though the finding of the jury affords an inference that he acted under that belief. The charge however was for the attempt only, and the decision assumed there had been no more than an attempt. The Court adopted the principles on which *Watkins v. The London and North-Western Railway Company* was decided. Mr. Justice Blackburn put two cases, as supposed cases only, and his so putting them shows how little questions of this kind have been before the Courts. He said he was disposed to think that if a servant in charge of money found another

attempting to steal it, and could not prevent him otherwise than by taking him into custody, he might have an implied authority to arrest him, or if he had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, that also might be within the authority of the person in charge of it. The learned Judge, however, declined to pronounce a decided opinion on these cases, and held that there was clearly no implied authority to give the Plaintiff into custody for an attempt to steal which had failed.

In none of the cases referred to did the question of the authority of a manager or agent entrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer, unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal, or had actually stolen it. In the latter of these cases it is part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority.

The liability of the bank in this case must rest either on the ground of some general authority in the acting manager to prosecute on behalf of the bank, or on a particular authority so to act in cases of emergency.



The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shown, to be within the scope of his authority; and his employers would be liable for his mistakes, and, under some circumstances, for his frauds, in the management of such business (*Mackay v. The Commercial Bank of New Brunswick*, L. R., 5 P. C. 394). But the arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. These may, and in practice do, vary considerably. In the case of a chief or general manager, invested with general supervision and power of control, such an authority in certain cases affecting the property of the bank might be presumed from his position to belong to him, at least in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors. But whatever may be the case in instances of this kind, their Lordships think that such a presumption cannot properly be made from the evidence given at the trial as to the position held by Mr. Wilkinson. It appears that the board of directors held their meetings at the bank office, and the general manager, Mr. Smith, also sat there; and the clear inference from the evidence (if believed) is that the acting manager was subordinate to the general manager, and that the latter was, as he presumably would be, subject to the superior authority of the directors. Supposing this to be so (and if the facts were disputed, the opinion of the jury should have been taken upon

them), their Lordships think it cannot be presumed, from his position alone, that the acting manager had general authority to prosecute on behalf of the bank, and therefore that evidence was required to show that such a power was within the scope of the duties and class of acts he was authorised to perform. The Plaintiff offered no evidence whatever on this point; and the testimony of the two managers which has been set out above directly negatives the possession of such a power by the acting manager. Mr. Wilkinson was not cross-examined on this point. Some uncertainty of statement no doubt appears in the cross-examination of the general manager, but according to their Lordships' interpretation of his testimony, his direct evidence as to the absence of general authority in the acting manager is not substantially impaired. The following statements of these witnesses were strongly relied on by the learned counsel for the Appellants: Mr. Wilkinson said, "In a case where a man  
" presented a forged cheque I have as account-  
" ant, and should now take proceedings to arrest,  
" where we have to catch the man on the spot,  
" only in such a case. I should do this as acting  
" manager or as assistant manager, accountant,  
" or clerk." The general manager spoke to the same effect: "I will not say that in  
" cases in which the property of the bank is  
" taken and in danger of being lost, unless arrest  
" ordered, action has not been taken without  
" reference to the board. In such an emergency  
" I should take the responsibility of violating the  
" rule, whether it would be my duty or not." But these statements at the most raise the question whether Wilkinson had authority so to act in cases of emergency, where immediate action is required, and the opportunity of arresting the offender might be lost if reference

was made to the general manager or the directors. Granting that these statements afford some proof of such an authority, the further question would arise whether there is evidence that an emergency in fact occurred.

An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shews that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is proved, it is enough to show, commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as that referred to, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision; and that question raises issues beyond the mere fact, that the agent acted on behalf of and in the supposed interest of the principal; were it otherwise, the special authority would be equivalent to a general one.

What then was the situation when these unwarrantable proceedings took place. The bill had been sent to Allen and Bowden as notaries to be presented to the Plaintiff for acceptance, and noted if acceptance was refused. It was a trade bill accompanied by shipping documents which were in the hands of the bank. The Plaintiff was a merchant having an office and clerks, one of them known to the notaries' clerk, and it was at his own office the bill was presented to him. According to the Plaintiff's evidence, he told the clerk he would accept and send it to the bank. The clerk (Muir) admits he said he would accept it, and thereupon the bill was left with him. Muir seems to have been blamed for leaving it, and Bishop, another clerk, went with Muir to the Plaintiff to demand it, and the Plaintiff, as Bishop says, put him off

on two occasions, and would have nothing to say to him. Some temper appears to have been shown on both sides. Upon Bishop going back to the office, a consultation took place among the clerks of Messrs. Allen and Bowden, and after referring to books, and apparently with the consent of one of the partners, it was determined to lay an information against the Plaintiff for stealing the bill. It cannot possibly be considered that this state of facts raised a case of emergency requiring immediate action by criminal proceedings against a person in the Plaintiffs' position, or afforded reasonable ground for supposing that such a case had arisen. There was no necessity for immediate action, nor was immediate action in fact taken. The Plaintiff was not at once given into custody, but an information was laid before a magistrate, and when he very properly refused a warrant to apprehend him, the summons complained of was taken out when there could evidently be no urgency either to obtain or serve it. It was obviously an attempt of the notaries and solicitors to recover the bill by means which were thought by them to be more effectual for the purpose than civil proceedings would be.

Their Lordships therefore think, upon facts which appear upon the evidence to be beyond dispute, that there was no necessity or apparent necessity for immediate action from which authority in the acting manager to instruct the solicitors (if he really did instruct them) to take these proceedings on behalf of the bank could be inferred.

It is to be observed also that the bill in question was not under Wilkinson's special charge. He says "the matter was not in his department. It was a branch business; the general manager takes that."

There being then no evidence of any emer-

gency, the case in their Lordships' view is brought to the issue that the bank would not be liable for the acts of Wilkinson unless it could be established that he had some general authority to institute criminal proceedings. They have already said that they think such an authority cannot be inferred from his position alone as it appears upon the evidence, and that the direction of the learned Judge was wrong. The verdict therefore cannot stand.

Their Lordships have lastly to consider whether they should direct a nonsuit or a new trial. The evidence upon which they have assumed the position of the acting manager to be as they have stated it, and the general evidence of the managers upon this part of the case were not, in consequence of the learned Judge's direction, considered by the jury. If their Lordships were called upon to put their own interpretation upon the evidence, they would be disposed—assuming it to be true—to hold that it does not afford sufficient grounds for inferring that a general authority to prosecute was within the scope of the acting manager's employment and duties; but they are not competent to judge of the credit due to the witnesses, which is the proper province of the jury; and on the whole, as the case on this point has not been presented to the jury, they have come to the conclusion that the rule should be made absolute for a new trial.

In case the action should be again tried, the jury should be told, if the evidence on the point should be to the same effect as on the first trial, that the facts do not present a case of emergency or apparent emergency from which authority could be derived, and consequently that the bank would not be liable for the act in question unless it is proved or can be inferred from the evidence that general authority to prosecute offenders for stealing the bank's

property connected with its business at Sydney, without consulting the general manager or the board of directors, was within the scope of Wilkinson's employment and duties, and the powers entrusted to him in relation thereto.

The question whether Wilkinson in fact authorised the solicitors to prosecute the Plaintiff will of course be open on the second trial.

In the result their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court discharging the rule, and to direct that the rule be made absolute for a new trial.

The Respondent must pay the costs of this Appeal.