IN THE HIGH COURT OF AUSTRALIA

ATKINSON

V.

CUSTOM CREDIT CORPORATION LIMITED

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on WEDNESDAY, 25th MARCH 1964

W. M. Houston, Govt. Print., Melb.

ATKINSON

v.

CUSTOM CREDIT CORPORATION LIMITED

ORDER

Appeal dismissed with costs.

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JUDGMENT

DIXON C.J.

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This is an appeal from an order of the Full Court of the Supreme Court of New South Wales setting aside a verdict of a jury recovered by the plaintiff in an action for malicious prosecution. In the Full Court, two judges, Brereton and Wallace, JJ., were of opinion that in lieu of the verdict for the plaintiff a verdict for the defendant should be entered. The third member of the Full Court, Walsh J., was of opinion that a new trial should be ordered limited to certain of the counts of the declaration. The amount of damages awarded by the jury was very large, viz. £25,000. The pleadings consisted of a declaration containing fourteen counts and one plea, the general issue. Three questions were left to the jury: (1) Did the defendant, through its employees, actively set in motion the proceedings against the plaintiff? The jury's answer was Yes. (2) Did the defendant at the relevant times believe in the charges that were preferred? Answer, No. (3) Was the defendant, through its servants or agents, actuated by malice in bringing this prosecution? Answer, Yes. It seems that these questions were put and the answers given as to each count in the declaration separately and it is probable that the jury so understood the proceeding. One count, the ninth, was dropped by the plaintiff or perhaps was considered to be without support in the evidence. At all events it can be disregarded.

After the jury had answered the questions the question of damages was taken up. Counsel addressed the jury and the judge summed up on the question of damages. A single award of damages was made on the whole declaration, that is, of course, apart from count (9). I would have thought this meant one verdict on the whole declaration but in speaking of the jury's

determination I notice that the order of the Full Court uses the plural "verdicts".

The plaintiff appellant described himself as a motor trader and at the time of the trial, which began on 7th February 1962 and occupied many days, was fifty-eight years of age. He had after the war carried on the business of a secondhand motor dealer, that is to say from about 1946. The defendant is a finance organization which among other things finds money in that trade. Among its employees were three who took an active part in Sydney in its management. First there was Kenneth Bruce Seddon who when giving evidence said that he came to the defendant's employ in May 1955 as Credit Manager. He had previously been employed by an organization called Industrial Acceptance Corporation. (2) James Vouden who in 1955 was, according to his own description, Office Manager; he left the employ of the company in November 1960; (3) Peter Lindsay Mafne, who in 1956 was Regional Manager for New South Wales and Queensland for the defendant company and for a time in 1956 became Acting State Manager. Seddon had been in the employ of Industrial Acceptance Corporation and through his work had knowledge of the plaintiff who did business with that company. According to the plaintiff's evidence Seddon invited him to give his business to the defendant company and this the plaintiff apparently did. That company had in the normal course of its business disposed of cars on hire purchase agreements which entitled the company in the case of default in instalments of hire to repossess the cars. When cars are repossessed in this manner a certain time must elapse under the legislation (Hire Purchase Agreements Act 1941-1957) before they can be disposed of. The cars were sent to the plaintiff's premises where they were displayed and of course were held for the

required time. The plaintiff would buy them sometimes; in other cases they would be sold from his premises. Negotiations between him and the representative of the defendant, usually Seddon, as to the possibility of his selling them took place and in many instances he would buy them. Besides repossessed cars other cars would go through the plaintiff's hands and analogous arrangements would be made with the defendant.

The plaintiff's business appears to have been extensive and involved some ramifications. As from 1st July 1955 he took over another business relating to motor cars called the Kiwi Servicenter Pty. Ltd. which he bought. This involved expenditure of capital and according to him the management of the defendant company knew that was so. He says he took over £2000 worth of debts of the Kiwi Servicenter Pty. Ltd. and mortgage liabilities of £19,000. Further, he paid a deposit of £1000. He told Seddon of this. He says, too, that largely because of the continuance of wet weather his business fell off. Before this occurred he had entered into certain general agreements with the respondent company. First there was a trade agreement (described as "Non-Recourse"). This agreement is a printed form of the Customs Credit Corporation framed so that the text is addressed to that body. It recites that during the course of the business of the signatory (that is the plaintiff) he receives offers from people who wish to take goods on hire purchase and proceeds that if he decides to give Custom Credit Corporation the opportunity of accepting any of this hire purchase business he agrees with that body on certain terms. The first is that by submitting to it a signed offer by anyone to take goods on hire purchase from it the signatory (that is the plaintiff) should be regarded as offering to sell to the Corporation the goods described in the signed offer at the cash list price of

the goods. The acceptance by the Corporation of the signatory's (that is the plaintiff's) offer to sell is to be regarded as then complete and the goods are to become the Corporation's own property and it lies in their discretion whether they will accept the hire purchase. The signatory (that is the plaintiff) will indemnify the Corporation against any damage the Corporation might suffer through breach of warranty; there were also certain other provisions not immediately material. This general agreement obviously was intended to make it possible to carry on a hire purchase business in which Custom Credit Corporation took the position of owners disposing of goods on hire purchase but finding the money immediately for the plaintiff. With this there was a supplementary agreement described as "Full-Recourse". This was a form of Custom Credit Corporation likewise addressed to that body and in the event signed by Atkinson as dealer. It threw upon Atkinson the obligation to purchase goods which had come into the hands of the Corporation through offers to hire submitted by Atkinson if afterwards the goods were repossessed, at a price equivalent to the total amount remaining to be paid under the conditions of the hire purchase agreement to entitle the hirer to become the purchaser, together with the amount of any expenses incurred by the Corporation in respect of obtaining or endeavouring to obtain possession, and any amount paid by the Corporation to the hirer. The signatory, that is Atkinson, thereby agreed to pay on demand, after the hirer under the hire purchase agreement had made default, a sum equal to the outstanding hire and expenses. In another form of agreement called a "display (used)" agreement, also addressed to Custom Credit Corporation, also signed by Atkinson, he says he will purchase on his own account used cars suitable for display which are in the agreement called "display units" and will forthwith submit to the Corporation in writing the same particulars of such display units as shall be required and

this shall be deemed to be an offer to sell to the Corporation the relevant display unit at the price for which he acquired it. The Corporation within a reasonable time might at its discretion accept or reject the offer but upon acceptance it should pay Atkinson a sum equivalent to the purchase price paid by him. Thereupon the display unit would become the Corporation's property and should "be held by me as bailee from you subject to this agreement". The display units would be purchased "only up to such limit as shall be set by you from time to time and in accordance with such directions as to type, price or otherwise, as you will give me from time to time". Such display units would be taken into Atkinson's showroom floor immediately after acquisition and be kept by him as bailee for the Corporation until he should commit any default under the agreement or should deliver the unit up to the Corporation or until the Corporation should take or demand possession, whichever should first happen. Then follow a large number of clauses dealing with the machinery of such transactions including this: "In the event of a sale of any such display unit (a) All moneys received by me on your behalf will forthwith be paid by me to you". Further clauses include a promise by Atkinson that if a display unit is not sold within eight weeks then at the Corporation's request he will at his own cost and expense deliver the display unit to the Corporation or to whatever place it should nominate. He promises to pay one per cent per month of the purchase price of each unit taken on to his floor from the date of the purchase by him until the termination of the bailment. He agrees to deposit with the Corporation an amount equivalent to ten per cent of the limit referred to. In a somewhat elaborate form of agreement called "Wholesale Display Agreement (Used)", the consideration on the part of the defendant Corporation is stated as authorising the dealer, that is Atkinson, to procure for the Corporation

used motor cars, referred to in the agreement as display units, which the Corporation proposes to allow him to display on his showroom floor at the dealer's principal place of business and the Corporation providing credit for the dealer for that purpose in an account to be styled "Custom Credit No. 10 (Used Car) Account" with a named bank at Burwood on the terms mentioned in the printed agreement. The dealer, that is the appellant Atkinson, is to arrange on the Corporation's behalf for the purchase for it of display units suitable for display on the dealer's floor. He is forthwith to notify the Corporation of the purchase, giving particulars. It is provided that the display units will be purchased only up to such limits as shall be set by the Corporation from time to time and in accordance with such directions as may be given by the Corporation and they will be held and kept by the dealer as bailee for the Corporation for display purposes only until either he commits default or delivers the unit up or the Corporation takes or demands possession or disposes thereof, whichever shall first happen. A variety of clauses follows including one requiring that the dealer shall use his best endeavours to sell or dispose of any such display unit on behalf of the Corporation at the earliest possible moment and will submit to it exclusively all offers to take on hire purchase. If it is not sold within eight weeks of being placed on the dealer's showroom floor then at the request of the Corporation the dealer will deliver it to the Corporation or at such place as it shall nominate. Some provisions are made as to the opening of the Custom Credit No. 10 (Used Car) account. The dealer or the Corporation may operate upon it. The bank account shall be used only for the purposes of display units under the agreement.

Business was carried on in Sydney by Atkinson with the support of the Corporation for some time in 1955-56 but his

own business deteriorated. Finally on behalf of the defendant Corporation accusations were made against him. It is in respect of proceedings to which some of these led that the action for malicious prosecution is brought by him. None of the accusations resulted in more than a committal and the Attorney-General refused to file any bill against him. It is now necessary to state what are the transactions or the matters which are the subject of the counts in the declaration for malicious prosecution. The first count is under the Crimes Act, sec. 178A: see vol. 3, p. 190. It is a count for receiving on or about 23rd February £495 upon terms requiring him to account for the whole of the money but fraudulently omitting to account to the defendant, that is the Corporation, for the said moneys so received in violation of the terms upon which he received the money. The second count is under the same section and is in respect of a sum of £729 which is alleged to have been collected at Burwood upon terms requiring him to account to the Corporation for the whole of the money but fraudulently to have been misappropriated to his own use. The third count again is under sec. 178A and is in respect of the same sum of £495 as is mentioned in the first count but differs from that count in charging not fraudulently omitting to account but fraudulently misappropriating the money to his own use.

Although there are thirteen counts in the declaration under consideration (that is, fourteen counts less the ninth on which a verdict for the defendant was entered) in fact they concern only a comparatively few distinct transactions, the apparently great number of the counts being due to the use of alternative descriptions of the charge based on the one transaction in a number of given cases. The first count, which relates to a Ford Consul No. ADC-127, as in effect has already been said, is given a separate version in the

third count. The fifth count, based on a transaction with a Jaguar No. ACX-462, is given a different version by the sixth count, based on the same car, and another version by the thirteenth count, based on the same car. Associated with that are the seventh count, based on a car identified as a Custom-line No. AZB-838, again the subject of the eighth count and the fourteenth count.

The first, second, third, fourth, eleventh, twelfth, thirteenth and fourteenth counts are all based on sec. 178A or sec.178B of the Crimes Act 1900-55. The essential groundwork of all the forms of offence created by sec. 178A of the Crimes Act is the collection or receipt of money or of some valuable security upon terms requiring its delivery or accounting or payment to any person and the fraudulent misappropriation or fraudulent omission so to account or pay. The burden in the present case rested upon the plaintiff at the trial of this action to shew by reasonable evidence that (1) the defendant was moved by some indirect motive in laying these charges or causing them to be laid, and (2) that there was an absence of reasonable and probable cause. The issue under (1) was entirely for the jury. The conclusion that there was or was not an absence of reasonable and probable cause was entirely for the judge. But if in reaching that conclusion it was material for him to take into account some subordinate matter of fact which was in dispute and which was the subject of evidence that was contested, he would be bound to submit that subordinate matter of fact to the jury for its decision. In the present case it was said on the plaintiff's part that the defendant by its servants and agents did not believe that the plaintiff was guilty of the charges made. Obviously the question whether it thus did or did not believe in the charges is a question of fact and if on the evidence it might be decided either way it would be a question for the jury. In

the cases already mentioned where more than one count was based on the same facts and represented only an alternative or alternative views of those facts, a conviction on more than one of the charges of this, as it may be called, alternative description would not be right. It is plain enough what happened. Assuming that the defendant believed the plaintiff should be charged with something and by its servants and agents was not sure, or at all events those advising the company, apparently the police, were not sure, what was the charge which should be laid against the plaintiff, they therefore laid charges of different descriptions on the same set of facts. On the whole case, viewing the evidence, I am disposed to think that the jury were entitled to infer that the officers of the defendant were determined in some way or other to seek a conviction against the plaintiff and were not sure of their ground in the case of the counts referred to. In the case of the counts which allege that the plaintiff stole a car, it is quite manifest on the facts that there was no common law larceny although the defendant may have thought that a charge of larceny as a bailee would lie. Where sec. 178A is used then the facts in support of each count vary. But in each case it is obvious that a question arose as to the terms upon which the money or valuable security (a cheque?) was collected or received. Further, there must have been an issue of fraudulent misappropriation or fraudulent failure to account. The fraudulent character was not a foregone conclusion. The plaintiff habitually used a mixed fund in his account and, as he said, the money went or disappeared. Throughout the whole case there is the ever present doubt or uncertainty of the character of the money used, i.e. money subject to a civil liability to pay or money belonging to another.

Having regard to all these matters I am not prepared to say that in the case of the counts referred to

the judge was not in a position to say there was an absence of reasonable and probable cause or that the jury was not entitled on the evidence to say that the defendant by its servants and agents did not believe in the charges. It is said that the plaintiff's case on the absence of reasonable and probable cause was limited to the hypothesis that the jury found to be true that the defendants/officers did not believe in their case. It has been said that the parties did not deal with the case according to the pleadings. I am not quite sure what the suggestion is but so far as I can discover the case was presented in Court as pleaded. I do not know that any new issues were introduced nor that any contest of fact arising under the general issue did not remain to the end in dispute. I am of course speaking without regard to the abandonment of the ninth count. There is more than one reason why the verdict cannot stand. To begin with, I am of opinion that the question of the responsibility of the defendant company for promoting the prosecution was left to the jury on a basis which cannot be sustained. I do not think that the powers of attorney which were relied upon for establishing the responsibility of the defendant for the prosecution by its officers have that result. But on the other hand it seems to me clear enough that the defendant was responsible for Mr. Maine's action, and that this, at all events, when coupled with the participation of Mr. Seddon and Mr. Vouden enabled the jury to find that the defendant was responsible for the prosecution of the plaintiff. Conversations took place before the prosecution was promoted concerning the possibility of the plaintiff, as it was said, "fixing up his outstandings". These conversations were deposed to by the plaintiff and of course the jury could act on his statement. There is evidence that on his replying that he could not fix up the outstandings immediately but

needed time, Mr. Maine turned round and said to the others: "Go out and get the cars this afternoon and then go to the police. We have had too much trouble with these dealers and we will make an example of this fellow". I am not able to accept the view that it was not open to the jury to find that the prosecution was promoted by the defendant nor the view that there was not an indirect motive, that is to say a motive other than the vindication of justice and the law. I think that in practical reality all the dealings of the plaintiff with the defendant were based on considerations of civil liability and not property. The reason for this is that the defendant wanted to be in the position of carrying on business without registering any bill of sale and without encountering the operation of the Money-lenders Act whether upon dealings with the plaintiff or with persons who obtained cars through the plaintiff. At all events it was a question for the jury whether all the transactions were not based upon civil responsibilities. As to the charge on which count thirteen is based and the charge upon which count fourteen is based, viz. charges of obtaining the Jaguar No. ACX-462 and the Customline sedan No. AZB-838 by means of valueless cheques, charges under sec. 178B of the Crimes Act 1920-55, I think those charges could not have been sustained because on the evidence it seems that the cars were not "obtained" by means of cheques. At all events the jury were entitled so to find. It is not my purpose to go over details of the evidence in this case. It is essentially a case in which the opinion of the jury is all-important and we are concerned only with the sufficiency of the evidence to go to the jury and with the ultimate responsibility of the judge for finding an absence of reasonable and probable cause. I think that it is a mistake to single out any particular count or any set of counts in the declaration and say that that count or those counts ought not to

go to the jury. It is a mistake because the case made seems to me to be one which the jury should consider as a whole and it is evident that upon the trial that is what the jury did. I would order a new trial on the whole declaration, excluding of course count nine.

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JUDGMENT

TAYLOR J.
OWEN J.

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In the action out of which this appeal arises the appellant sued the respondent for damages on fourteen counts alleging malicious prosecution. At the trial the appellant obtained a verdict for £25,000 damages but on appeal to the Full Court of the Supreme Court the verdict was set aside and, by majority, judgment on all counts was entered for the defendant. Walsh J., however, was of the opinion that there should be a new trial on seven of the counts - the fifth, sixth, seventh, eighth, eleventh, thirteenth and fourteenth - but he agreed that judgment should be entered for the respondent on the remaining counts. It should, perhaps, be mentioned that no question arises concerning the ninth count for the appellant did not offer any evidence upon it at the trial and by direction a verdict for the respondent on that count was returned by the jury. For reasons which will appear it is abundantly clear that the verdict found for the appellant at the trial could not be allowed to stand and the question in the case now is whether the majority of the Full Court were right in thinking that judgment should be entered for the respondent on all counts or whether there should be a new trial in relation to some or all of them. Questions arose before the Full Court relating to the sufficiency of the evidence to justify a finding favourable to the appellant on a number of issues in the case including such matters as the authority of various officers of the respondent, whether those officers or any of them instigated the proceedings of which the appellant complains, whether there was any want of reasonable and probable cause for those proceedings and

whether there was any evidence capable of justifying a finding of malice on the part of the respondent.

The first charge made against the appellant was one of fraudulently omitting to account for the sum of £495. It was concerned with the proceeds of a used motor-car which was said to have been held by the appellant for sale on behalf of the respondent and it was alleged that the appellant had fraudulently omitted to account for the proceeds of sale. The charge was laid under s. 178A of the Crimes Act and a warrant for the arrest of the appellant was issued upon an information sworn to by one Vouden, the office manager of the respondent, on the 20th March 1956. This was the only charge preferred against the appellant at this stage but on the 18th April 1956 he was, apparently, before the Court and orally charged by the police prosecuting officer with seven more offences. Five of these charges related to alleged fraudulent misappropriation in relation to other car dealings and each of the remaining two charges alleged that the appellant had obtained a motor vehicle the property of the respondent by means of a false pretence. These two charges were laid under s. 179 of the Crimes Act. At a later stage, on the 27th June 1956, three more charges were preferred. One of these alleged a further fraudulent misappropriation in connection with another dealing and the other two related to the two motor vehicles just mentioned and were laid under s. 178B of the Crimes Act. Finally, on the 4th September 1956, these lastmentioned two charges were dismissed by the presiding magistrate who, however, upon consideration of the evidence before him, directed that the appellant be charged with stealing each of the two cars in question. Upon these two charges and the other outstanding charges the appellant was committed for trial but no bill was filed.

As may be readily enough supposed the respondent

was a finance house and the appellant was a second-hand motor-car dealer and the various charges which were laid were concerned with dealings which took place in the course of their business association. The course which this association took is fully set out in the reasons of Brereton J. and it is unnecessary that this should be done again. It is sufficient at this stage to say that in March 1956 it became apparent that the appellant was in serious difficulties and was unable to account for moneys which he had received upon terms requiring him to account to the respondent. It was in these circumstances that he was interviewed by Vouden on the 16th March 1956 when he is said to have admitted that he was unable to account for the sum of £495 received by him on behalf of the appellant on the sale of a used motor-car - a Ford Consul. "He had", he said, "placed all his money in his own account and used it in connection with his business". On the same day he was questioned concerning his failure to account for the proceeds of the sale of other cars. Apparently the questioning was done by Vouden and, perhaps, by another officer of the respondent, Seddon, who was its credit manager and they reported to Maine, who was said, at that time, to be the Acting State Manager of the respondent and, normally, the Regional Manager for New South Wales and Queensland, that the appellant was not able to account for all of his stock. At this stage Maine saw the appellant and there was a further discussion. There is some difference between the account given by the appellant of this discussion and that given on behalf of the respondent, but since we are required to consider the sufficiency of the evidence in the case we shall take the appellant's account. He said that the discussion was brief and that Maine asked him whether he could "fix up his outstandings immediately". According to the appellant he said "Not immediately; I

need a little time". Thereupon, the appellant says, Maine immediately turned round to Vouden and Seddon and said "Go out and get the cars at once this afternoon, and then go to the police. We have had too much trouble with these dealers and we will make an example of this fellow". There was, according to the appellant, no further conversation with Maine. The appellant deposed that that afternoon Seddon attended at his business premises at Enfield with other employees of the respondent and between twenty-six and thirty motor vehicles were removed by them. Shortly afterwards the police were called to the respondent's premises where, first of all, they saw Seddon. According to Sergeant Barter, Seddon told him that a dealer by the name of Atkinson had entered into a wholesale agreement with his company, that the company had lodged an amount of £3,000 in an account at the National Bank of Australia at its Burwood branch and that under this agreement and with funds provided from the account Atkinson purchased motor vehicles on terms requiring him to pay into the account either immediately or by means of his own cheque the proceeds of sale of any such vehicles. There was, according to Seddon, a discrepancy in the account amounting to about £3,000. There was no money left. An additional transaction was mentioned concerning a cheque for £1,400 that had been given to Atkinson and that money had not been accounted for. After this conversation Vouden made his appearance and he confirmed what Seddon had told Sergeant Barter. The date of this interview was the 19th March and on that day the police officers took several statements from both Seddon and Vouden. Other statements were obtained from both Seddon and Vouden on subsequent days and altogether the police came back to the respondent's office on three or four occasions after the 19th March.

On the strength of these statements the police made enquiries and obtained statements from other persons concerned in the transactions with the appellant and it

took, according to them, about a month before they were able to prepare appropriate charges in addition to the initial charge already mentioned. After they had completed their investigations they "worked out what charges appeared from the evidence". Sergeant Barter and Sergeant Fraser together formulated the various charges but they were not preferred until after full discussion with the police prosecuting staff for the purpose of checking them. As already appears on a few occasions after Atkinson's arrest the police officers attended the respondent company's offices and according to the evidence of Sergeant Barter "advised as to the proceedings" and informed them what charges had been supported by the facts. They, it was said, were quite happy for the other charges to go on. In effect, Sergeant Barter, when questioned closely concerning his discussions with the respondent's officers from time to time, said that what he did was to inform "them" that the appellant would be charged with the additional charges.

As already appears the members of the Full Court were unanimous in the view that there was no evidence to support a verdict for the appellant on the first, second, third, fourth, tenth and twelfth counts. The opinion which their Honours entertained was that there was no evidence capable of justifying a finding that any of the proceedings referred to in these counts were instituted maliciously or without reasonable and probable cause. In our view their Honours' observations in relation to these counts were undoubtedly correct and, that being so, it is clear that the general verdict for £25,000 damages could not be allowed to stand. But Walsh J. was of the opinion that there should be a new trial on the seven counts already specified. These counts, other than the eleventh, related to what was, in effect, one transaction whilst the eleventh count related to another and the view which that learned judge took depended upon particular matters which emerged

upon a close examination of the facts relating to these transactions. But those matters, to which reference will presently be made, were not considered by his Honour to be of such a character as to provide evidence of malice generally in relation to all of the proceedings which were commenced against the appellant but sufficient only to justify a finding of malice in relation to the charges concerned with those particular transactions. At the same time the same matters,he thought, provided some ground for finding that those particular charges were laid without reasonable and probable cause. Having expressed our concurrence with the unanimous views of the members of the Full Court in relation to the counts earlier specified it will, we think, be sufficient to proceed to consider the questions raised in relation to the counts which Walsh J. thought should go down for a new trial. But before proceeding to consider the particular matters which seemed to the learned judge to provide some evidence of malice and want of reasonable and probable cause in relation to those causes of action it is not out of place to mention other difficulties which, it seems to us, lie in the path of the appellant.

At the outset there is the question whether there was evidence to justify a finding that the charges now in question were laid at the "instigation" of the respondent. This matter has given us considerable difficulty but on the whole we are inclined to agree with the view, more definitely expressed by Brereton J., that the circumstances disclosed by the evidence suggest that, as to each charge laid by the police some officer of the respondent was referred to, "as to whether they approved of it being laid and hence that the choice was being left to them as to whether proceedings should be taken in respect of any particular dealing, though not, perhaps, as to the precise form of the charge". But we do not agree with his Honour that the

evidence went to show that the police officers who were concerned in the matter consulted both with Vouden and Seddon with respect to each charge that was formulated. It may, of course, be true to say that either Vouden or Seddon was consulted on different occasions but the evidence does not by any means permit one to identify those charges which received Vouden's blessing and those which Seddon might be said to have instigated. Indeed the evidence on this point is markedly imprecise and this is not without importance in the case. Seddon, himself, said that he did not know what charges were laid against the appellant and that he had nothing to do with them. He admits that police officers, from time to time, referred certain matters to him but maintains that they did not tell him what the charges were going to be. Vouden does not appear to have been directly questioned upon the point. Sergeant Barter, after referring to the circumstances in which the first charge was preferred, said that he and another officer on several occasions had attended at the respondent's office after Atkinson's arrest and that "they were kept fully acquainted and advised as to the proceedings and they were informed of the charges that have been supported by the facts and they were quite happy for the other charges to go on". He does not, however, say who "they" were. But a reading of his evidence shows that conversations sometimes took place with Vouden and sometimes with Seddon. In terms, Sergeant Barter said that he or Sergeant Fraser "told Vouden or Seddon that in their opinion the evidence available to the police supported those charges" and it is clear enough that sometimes they saw one officer and sometimes the other. On the evidence it was, we think, open to the jury to find that Vouden was responsible for the institution of some of the proceedings of which the appellant complains and that Seddon may have been responsible

for others but there is nothing in the evidence which enables it to be said which of them initiated the proceedings which are the subject of the counts which Walsh J. thought should go down for a new trial.

However the question arises whether Maine or, alternatively, Vouden or Seddon had authority to initiate the proceedings complained of on behalf of the respondent. To establish that Vouden and Seddon had such authority the appellant relied primarily upon the terms of powers of attorney given to each of these officers in identical terms. Each instrument recited that the company was desirous of appointing a proper person as its attorney with such powers and authorities as might be necessary or convenient for enabling him to appear and represent the company in such courts or tribunals as were thereinafter referred to in the manner thereinafter set forth. Therafter it was provided that for effectuating the purpose aforesaid the company thereby nominated and appointed and in its place and stead put and deputed the officer concerned its true and lawful attorney for it and in its name and as its act and deed or otherwise as he might deem expedient to institute commence and prosecute and to appear in and defend or compromise any action application or proceedings then or thereafter to be instituted commenced or prosecuted by or against the company or in which the company had been joined or was or might be entitled to join as a party in any Small Debts Court or Court of Petty Sessions anywhere in the State of New South Wales or in or before any tribunal in New South Wales presided over by a Stipendiary or Police Magistrate and (in) the same actions applications or proceedings to refer to arbitration or to abandon discontinue submit to judgment or become non-suit and generally to have the conduct of any such action application or proceedings and to represent the company before any such court or tribunal as aforesaid and to

examine and cross-examine witnesses and to address and to make admissions of fact and submissions of law to any such court or tribunal. The majority of the Full Court were of the opinion that no authority was given by these powers of attorney to initiate proceedings of the kind here in question though Walsh J. thought otherwise. In our view the opinion of the majority was correct. To our minds it is clear from an examination of the recitals and the operative part of the instruments that criminal proceedings of the kind under consideration do not answer the description of "any action application or proceedings ... by or against the Company". Nor, in our view, were the proceedings complained of proceedings "in any Small Debts Court or Court of Petty Sessions ... or in or before any tribunal in New South Wales presided over by a Stipendiary or Police Magistrate". We agree generally with the views of the majority of the Full Court on this point and do not feel it necessary to say more. But at the trial the jury was directed that the powers of attorney conferred authority on Vouden and Seddon "to lay criminal proceedings" on behalf of the respondent if they saw fit to do so. This is another reason why the verdict which the appellant obtained could not be allowed to stand.

The next question in the case is whether there was any other evidence sufficient to justify an inference that the proceedings were initiated with the authority of the respondent. For this purpose the appellant points to the evidence concerning the direction given by Maine on the 16th March 1956. What he then did, in the language of the appellant, was to instruct Vouden and Seddon to "go out and get the cars back and then go to the police". But it is one thing to make a report to the police concerning an apprehended crime, or crimes, and another to institute or instigate or to counsel and persuade (Commonwealth Life Assurance Society Limited v. Brain (53 C.L.R. 343)) an

officer of police to institute criminal proceedings. In our view the respondent's evidence concerning the direction given by Maine to Vouden and Seddon gives no support to the proposition that Maine authorised those officers of the respondent to institute or instigate criminal proceedings against the appellant. But even if it did there would remain the question of Maine's authority to authorise the institution of proceedings on behalf of the respondent. There was no evidence whatever on this point and in spite of the fact that Maine, Vouden and Seddon were called as witnesses neither party examined any of them on the point. Probably, the appellant refrained from doing so as an unfavourable answer would have been detrimental to his case and he was content to rely upon the powers of attorney and, perhaps, additionally, upon the fact that Maine was, at the time, the respondent's acting State Manager. But it was for the appellant to establish that the proceedings were instituted or initiated with the authority of the respondent and since the powers of attorney have failed him he must now rely exclusively upon the proposition that Maine, as acting State Manager, had implied authority to exercise his own discretion on behalf of the respondent concerning the institution of the proceedings. Whether or not, if he had such authority, it was permissible for him to delegate an authority of such a special discretionary character to his subordinates may be open to question. However, the conclusion that he had such implied authority is not, in our opinion, open on the evidence. One may, of course, assume that he had authority in this State to conduct the ordinary business operations of the respondent and, whilst this may entitle one to conclude that giving a person into custody in order to protect the company's property might constitute part of the discharge of the duties of his office, it is difficult to see that the institution of criminal proceedings

for the purposes of punishing a wrongdoer could in any sense amount to the performance or discharge of his duties as an acting manager of the respondent's business (see Bank of New South Wales v. Owston (L.R. 4 App. Cas. 270); Hanlon v. Manson (2 N.S.W. L.R. 291); and Hamilton v. Hordern (3 S.R. (N.S.W.) 139)). These are not recent cases and it was urged that the manager of a modern-day finance company must be regarded as occupying a somewhat special position. But we think that the basic proposition upon which those cases depend is still valid, that is, that the implied authority of the manager of such a business cannot be taken to extend beyond the ambit of the business activities in which it is ordinarily engaged.

At this stage we return to a consideration of the particular matters which Walsh J. thought provided sufficient evidence to justify a finding of want of reasonable and probable cause and a finding of malice in relation to certain of the charges. It is convenient, first of all, to deal with the charge which was the subject of the eleventh count of the declaration. The charge with which this count was concerned was that the appellant, having collected the sum of £270 upon terms requiring him to account to the respondent for the whole of that sum fraudulently misappropriated to his own use the whole of such money in violation of the terms upon which he had collected it. The charge was laid under s. 178A of the Crimes Act (cf. R. v. Ward (38 S.R. (N.S.W.) 308)). In his statement to the police Seddon said that on the 15th February 1956 he had a telephone conversation with the appellant concerning a motor vehicle - a 1949 M.G. roadster - which had been repossessed and which was then at the appellant's premises, and asked him if he was interested in buying it. The appellant, he said, answered in the affirmative and said he would call and see Seddon about it. According to the

statement the appellant called on Seddon on the same day and, the purchase price having been fixed at £300, the appellant said "Would £30 deposit and the rest financed suit you?" Seddon acquiesced in this proposal and then caused a hire purchase agreement, in a somewhat unusual form, to be drawn up. It provided for payment of a deposit of £30 and for the balance of £270 to be paid "one month from the date hereof". The term of the hiring was expressed to be one month and the agreement contained the usual stipulation that the hirer would retain "the goods" in his possession and that he would not sell, assign, pledge or encumber the goods. The agreement was signed by the appellant on the 15th February and it bears that date in his handwriting. It was formally accepted on behalf of the respondent on the 20th February 1956 as appears from a notation thereon. Notwithstanding the execution of this instrument it was quite plainly contemplated that the appellant should be at liberty to sell the vehicle at any time after the 15th February. So much is common ground. According to Seddon's statement he said to the appellant at the time the transaction was arranged "I want you to understand that when you sell the vehicle, the amount of £270 must be paid immediately to the Company", whereupon the respondent said: "Yes, that will be alright". The statement further relates that on the 16th March Seddon saw the appellant at the respondent's premises and, having shown him the hire purchase agreement, asked "What became of this vehicle?" The statement then proceeds: "Atkinson said 'I have sold it'. I said 'When you left me on the 15th February, I gave you to understand that the amount of £270 was to be paid to the Company for the sale money of the vehicle'. 'It has not been paid and I want the money'. Atkinson said 'I sold the vehicle and I put the proceeds into my account at the Bank'. I said 'Can you give me the money

now'. Atkinson said 'No I haven't got it to give you'". It was denied by the appellant in his evidence at the trial that Seddon had said on the 15th February 1956 that if the car should be sold "the amount of £270 must be paid immediately to the Company". He insisted that under the arrangement then made he was to have one month's credit in any event. But it was clear enough that it was Seddon's understanding that if the vehicle should be sold whilst it was still, in law, the property of the respondent the appellant was to account to the respondent for the sum of £270 out of the proceeds. In this divergence of testimony Walsh J. entertained the view that a jury would be entitled to find that Seddon had knowingly made a false statement to the police and that this provided some ground upon which the jury might find for the appellant on the issues of malice and want of reasonable and probable cause. On this point he said:

> "The importance of the alleged stipulation as to paying the money immediately when the vehicle was sold, lies in the fact that it provides a basis for a view that, as at 16th March, there had already been a failure to pay as required by that stipulation if, as Seddon says, the respondent admitted he had then already sold the car. On the other hand, if there was no such express stipulation then, on the respondent's version of the general practice, no obligation to repay had yet arisen at the time of the interrogation or (probably) at the time of the statements to the police on 19th March. Here again there is, in my opinion, material which makes it a question of disputed fact as to whether Seddon falsely introduced into his statement to the police, an alleged fact which was of importance to a consideration of the laying of charges. Mr. Smyth had submitted, in relation to this matter and I think in relation to others, that if it be assumed that the statement of Seddon to the police was wrong, this does not provide evidence that he did not believe it to be true, for he may merely have been mistaken. But here the situation is that Seddon was adhering, at the trial, to a statement which the respondent was describing as 'nonsense' and I think it was open to a jury to conclude, if it accepted the respondent on this matter, that when Seddon told the police this had been said, he was well aware it had not".

But with respect to the learned judge we are unable to agree with his conclusions. To our minds Seddon's statement that if the car was sold the money should be paid immediately

was of no importance in relation to the charge which was ultimately laid. First of all we think it was very much open to question, if it was the fact that one month's credit was to be allowed, whether that period of credit did not expire on the 15th March 1956, that is to say one month after the date which the appellant had subscribed on the hire purchase agreement. The fact was, of course, that the hire purchase agreement was not formally accepted until the 20th February 1956, but it seems to us that the period of "one month from date hereof" constituted a reference to the date which was subscribed on the instrument by the appellant himself. Secondly, it was pointed out to us that Seddon's statement to the police officers was not made on the 19th March 1956 but a few days later when, even if a month's credit from the 20th February 1956 had been given, that period had already expired. But what is of more importance to observe is that this charge was not laid until the 18th April 1956 when on any view of the matter any period of credit extended to the appellant had expired and it was of no consequence whether he had fraudulently failed to account either immediately upon the sale of the car or within a period of one month after he had made the arrangement with Seddon. Further, the evidence was quite inadequate to enable the jury to find that it was Seddon who had authorised the police on behalf of the respondent to lay this charge against the appellant and, accordingly, the evidence is quite insufficient to enable it to be said that the prosecution had been inspired by malice on the part of the company.

The other particular matter which Walsh J. thought provided some evidence of malice and want of reasonable and probable cause was concerned with the fifth, sixth, seventh, eighth, thirteenth and fourteenth counts. As the learned trial judge said these counts were "based upon two groups of charges, one group relating to a Jaguar car and the other to a Ford Customline. As to the Jaguar,

there was a charge on which the respondent was committed for trial, of falsely pretending to Seddon on 7th March 1956, that a purported cheque was a genuine and available order for the payment of £345, and thereby obtaining from Seddon a Jaguar the property of Custom Credit Corporation Ltd. (Count 5). There was a charge, formulated by the magistrate after the hearing, of stealing the Jaguar, on which the respondent was also committed for trial (Count 6). There was a charge,which was dismissed by the magistrate, of obtaining the Jaguar from Seddon by passing a cheque which was not paid on presentation (Count 13). Corresponding charges relating to the Customline, in which the amount involved was £815, are those to which Counts 7, 8 and 14 relate". These two vehicles were also repossessed vehicles and they found their way to the appellant's premises on the 8th and 15th of February 1956 respectively. According to Seddon's statement to the police he had a conversation with the appellant on or about the latter date and asked him if he wished to purchase the vehicles. The appellant replied "Yes, what do they owe you?" Seddon said that he was able to say that there was £918 owing on the Ford but that as the repossessions had been effected by the respondent's Melbourne branch he was not able to answer with respect to the Jaguar. Thereafter the statement proceeds:

> "A few days later, I again had a telephone conversation with the Defendant, I said 'About the Ford and the Jaguar we discussed the other day.' Atkinson said 'My offer is £815 on the Ford and £345 for the Jaguar.'
>
> I said 'I can't accept the offer at the moment as these are both Melbourne accounts, I will contact Melbourne and see if they will accept your offer.'
>
> On the 7th March, 1956, I saw the Defendant at my Office and I said 'I have received confirmation from Melbourne respecting the Ford and the Jaguar car, they will accept your offer on both vehicles.'
>
> Atkinson said 'Good, I will write you cheques for them.'

He then wrote out two cheques in my presence both dated the 7.3.56, one for the amount of £815, other for £345, drawn on the Australian and New Zealand Bank Limited, Burwood Branch, signed by Atkinson, drawn on his No. 2 account.

.....

He handed them to me.

I said 'I suppose these cheques will be alright, Les.' Atkinson said 'They are O.K., a 100 per cent.'".

The two cheques were subsequently dishonoured and according to his statement Seddon saw the appellant on the 17th March 1956 at the latter's premises where the following conversation quoted from the statement is said to have taken place:

"I said 'Those two cheques you gave me in payment for the Ford and Jaguar for our Melbourne Office have bounced and have been returned marked refer to drawer.'

Atkinson said 'Yes, I have been expecting them to come back I have no money to meet them.'

I said 'You told me that they were alright, what are you going to do about them.'

Atkinson said 'I can't do anything about it, I haven't any money to give you.'

I said 'What became of the two cars.'

Atkinson said 'I sold them through Auto Auction.'

I said 'If you sold them through Auto Auctions, you got the money for them, what have you done with the money.'

He said 'It has just gone, I don't know.'".

It will be observed that according to Seddon's statement the transaction concerning these cars was not effected until the 7th March 1956, that is, the day when the appellant's cheques were handed over. But at the trial the appellant maintained that the relevant transaction took place some six or seven days before the cheques were handed over and with this Seddon agreed at the trial. Nevertheless he maintained, in effect, that by reason of the course of business between the appellant and the respondent there was an obligation upon the appellant to account to the respondent immediately upon the sale of the vehicles in question. Some support

for this view is to be found in the evidence of the appellant who put a different complexion on the transaction. We quote from his evidence:

"Q. In relation to the 5th, 6th, 7th, 8th, 13th and 14th counts, do you remember two cars being lodged in your yard in February 1956? A. Yes.

Q. And what sort of cars were they? A. A.Jaguar and a Customline.

Q. Did Mr.Seddon speak to you about those cars? A. Yes.

Q. What did he say to you? A. He rang me before they arrived and he told me, 'I will be sending you out two cars. They are a Jaguar and a Customline. They are Victorian repossessions and have to be sold at auction, so lock them up and forget about them'.

.....

Q. Later on, were you out when he rang you up about them? A. Yes; I was out several times, but we did not have a discussion until such time as they were just about ready for sale.

Q. Did he ring you then? A. Yes, right at the end of February. He said, 'Les, that Jaguar and Customline are ready for sale. Would you clean them up and get them in to auction?'

Q. What did you say? A. I said, 'Okay, I will do that', and we cleaned them up and I took them down to the auction the following day, which I think, to the best of my recollection, was March 1.

Q. Were they submitted for auction? A. They were.

Q. In your name or Custom Credit? A. In my name.

Q. Were any offers or bids received? A. Yes.

Q. What were they? A. Yes, they got the offers on them. It would be £865 for the Customline - or have I got it wrong? I am not sure of those vehicles. This is difficult. The offers were about £20 less than they were sold for.

Q. Was it £820? A. Pardon?

Q. What was the figure? Was it £820 for the Customline? A. That was to me?

Q. Offers at the auction? A. I was thinking of gross offers. It was £820 for the Customline and £850.

Q. I want to know how much was offered at the Auction sale? A. It would be £865 for one - £835 --

Q. Just leave the price for the minute. After the offers were made, did you go to Seddon? A. Yes.

Q. What did you say to him? A. I told him we had had offers. He said, 'Well, how much do you

want out of it?' - Want to make out of it?' I told him I had only just cleaned them up and taken them in and if I made £5 on each car that would be okay. He said 'Okay. Go ahead'.

Q. Did you go back to the auction rooms? A. I went back to the auction rooms and told them to let the cars go".

The next passage is taken from the appellant's cross-examination:

"Q. I want to ask you some questions relating to the matters the subject of the fifth, sixth, seventh, eighth, thirteenth and fourteenth counts, concerning which you gave evidence at p. 128 of the transcript. Now, what you said was this: 'He (that is Seddon) rang me before they arrived and he told me I will be sending you out two cars. They are a Jaguar and a Customline. They are Victorian repossessions and have to be sold at auction, so lock them up and forget about them'? A. Yes.

Q. And then you said that the Customline arrived about 8th February and the Jaguar a few days before that? A. To the best of my memory.

Q. To the best of your recollection? A. Yes.

Q. And you did have a discussion, you said, when they were just about ready for sale? A. That is correct.

Q. And you said that that was right at the end of February? A. Yes.

Q. And that he said to you 'Les, that Jaguar and Customline are ready for sale. Would you clean them up and get them in to auction'? A. That is correct.

Q. And that is the truth, is it? A. Yes.

Q. And you said 'O.K., I will do that'. You then said 'We cleaned them up and I took them down to the auction the following day which, I think, to the best of my recollection was March 1st? A. That would be correct.

Q. Then you were asked:

'Q. Were they submitted for auction? A. They were.

Q. In your name or Custom Credit? A. In my name.

Q. Were any offers or bids received? A. Yes.

Q. What were they? A. Yes, they got the offers on them. It would be £865 for the Customline - or have I got it wrong? I am not sure of those vehicles. This is difficult. The offers were about £20 less than they were sold for.'

Then you were asked by your counsel: 'Was it £820?' and you said 'That was to me? I was thinking of

gross offers.' Then you were asked to leave the price for a moment and you were asked:

'After the offers were made, did you go to Seddon? A. Yes.

Q. What did you say to him? A. I told him we have had offers. He said "Well, how much do you want out of it?" - "want to make out of it?" I told him I had only just cleaned them up and taken them in and if I made £5 on each car that would be O.K. He said "O.K. go ahead".'

Then you went back to the auction rooms and you collected £1170, you say, several days later, and then you put that in your business account and you drew cheques for the defendant on 7th March? A. Yes.

Q. And those cheques were for £815 and £345? A. Yes.

Q. Now, this was the position: that these were repossessed cars which you were selling on behalf of Custom Credit? That was the position, was it? (Objected to; allowed).

Q. That is so, isn't it? A. That I was selling them?

Q. For Custom Credit? A. No, that is not correct.

Q. Well, isn't that what you suggested before? A. No.

Q. Isn't that what you said? A. I bought these cars before I sold them. I had to transfer title."

What the precise effect of the arrangement was may be a matter of some doubt but the respondent's evidence could not lead to the conclusion that there was a sale to him of the two vehicles. Rather it suggests that in return for a small sum he prepared the vehicles for sale and with the authority of the respondent and for reasons of policy they were submitted for auction in his name. But however this may be what Walsh J. thought was important in the matter was that Seddon's statement was erroneous in asserting that the transaction with the appellant took place on the 7th March 1956 whereas, in fact, it had taken place some six or seven days earlier. The statement was, he thought, "wrong in a most important respect" and there was "conflicting evidence as to what really occurred and as to the alleged conversation and admissions by the respondent on the 17th March". Thereupon his Honour

said: "It seems to me that there are questions here for a jury to consider and that these have a real bearing on the question of reasonable and probable cause, in its subjective aspect, that is, in relation to Seddon's state of mind and his belief at the time when this matter was placed before the police. Upon findings which it was open to them to make, the jury could have regarded the version given to the police as being intentionally false in an important respect, to the prejudice of the respondent". With respect to the learned judge we are unable to find any real conflict in the evidence as to what occurred when the appellant was interviewed by Seddon at his premises on March 17th. He was questioned in cross-examination as to what occurred at the various interviews after it was discovered that he could not account for a number of cars and, in particular, as to discussions which took place at the respondent's premises on the 16th March. As far as we can see he did not, at any stage, unequivocally deny the contents of the statement in so far as they relate to his interview with Seddon. He admitted that on the 16th March he was questioned about a number of the vehicles for which he could not account and his recollection of what was then said was, to say the least, hazy in the extreme and he did not profess to remember much, if anything, of what was said. He had in his evidence in chief referred to an interview which had taken place with Vouden and Seddon on the 16th March, although there seems to be some doubt whether these conversations took place with Vouden or Seddon, and the following examples are taken from his cross-examination:

> "Q. ... You have given evidence that you spoke to Mr. Seddon? A. Yes. On what particular date is this?
>
> Q. 16th March, the Friday? A. I spoke to Mr. Seddon on the 16th.
>
> Q. He asked you then to come in? A. On the 16th?

Q. Yes. A. No. I had arranged to go in on the 16th some days previously.

Q. At all events you went in on the 16th?
A. That is so.

Q. He asked you to account for these missing vehicles, did not he? A. He made a stereotyped demand for the payment of all my outstandings.

Q. I am putting to you that he asked you to account for these missing vehicles? A. Not on that day particularly as I remember it.

Q. You won't deny it? A. It is very difficult to remember, but as I remember that day the conversation was very very short.

Q. There were quite a few of them, were not there?
A. No. I was only in the office a very short time.

Q. Do you remember his saying to you in respect of the car mentioned in the second count, 'the Holden car, No. ARO-427, is missing from your floor. What have you done with it?' Do you remember him asking that? A. Not particularly. We discussed that previously.

Q. The fact is that that car was missing from your floor? A. Yes. I was not in possession of it at that time.

Q. It was not surprising that he asked you about it, was it? A. No.

Q. You said to him, 'I have sold it'? A. He knew that I had sold it.

Q. You said to him, 'I have sold it'? A. I do not know about that day. I told him I had sold it earlier.

Q. Some time earlier you told him you had sold it?
A. Yes.

Q. He said, 'What did you do with the £729 still owing?' He asked you that? A. He could have at some time.

Q. You would not deny that he asked you that? A. No.

Q. You said, 'I have placed it in my account at the bank'? A. Yes.

Q. Then he said to you, 'You had no authority to do that. You know you should have paid Custom Credit the £729 immediately you sold the car.' That is what he said to you? A. He could have said it. He said it some time probably.

Q. You said, 'Yes, I know. I have used the money in my business.' You said that? A. According to Mr. Seddon.

Q. No, I am putting to you that you said it? A. I could have said that.

Q. He said, 'You had no right to do that'? A. I don't remember."

.....

"Q. When you went in on the 16th March Mr. Vouden said to you, did he not, 'There is an amount of £830 owing to my company for a Volkswagen sedan,' giving the number, and you were shown the stock sheet; do you remember that? A. I do not think all these conversations took place on the 16th.

Q. I am suggesting that they did. Will you disagree that he did say there was an amount of £830 owing, and he did produce the stock sheet? A. At some time.

Q. I am suggesting to you it was the 16th March. Will you deny it was the 16th? A. Trusting to my memory I could not deny, because I could not say with any degree of certainty.

Q. Did he say, 'The money had not been credited to my company's account, I want the money or the car for this transaction'? A. Are you suggesting they said that in respect of each car?

Q. No. I am suggesting in regard to the Volkswagen he said, 'The money has not been credited to my company's account. I want the money or the car'? A. That was said generally over the deficiency. I do not remember at any time being asked about each individual car.

Q. You won't deny that you might have said that in respect of the Volkswagen? A. He could have, but I don't remember. Not particularly on its own.

Q. Will you agree that you said, 'I have sold the Volkswagen to a party who has gone to Perth. I put the money into my account at Burwood'? A. That is correct.

Q. You said that? A. Except that I am not certain when it was said. I know I told the truth. I did not try to hide anything.

Q. He then said, 'You have no permission to put that money into your own account. You will have to pay the money over'. He said that? A. That is what he said.

Q. No, I am asking you to agree that he said it. A. He could have at some time.

Q. And you said, 'I have not got the money. I have used it in my business'. That is what you said? A. I think that answer covered the whole of the inquiry."

.....

"Q. Do you remember Mr. Vouden saying to you on the 16th March, 'This bank statement shows that on the 28th February, 1956, two cheques were debited against the account, one for £625 and one for £590'? Do you remember him saying that? A. Not particularly, but he could have.

Q. He showed you the bank statement. He showed you the original of what I have just shown you? A. What date was that?

Q. On the 16th March he showed you? A. It is possible.

Q. He then went on to say, 'We have not received any stock sheets for these particular amounts. Why were the cheques drawn?' He said that, did not he? A. He could have. I don't recollect it.

Q. You said, 'I just cannot think now. I think they were for two cars I purchased'? A. That is probably correct.

Q. That is probably what you said? A. Yes.

Q. And Mr. Vouden then said to you, 'Why did not you give us stock sheets for them if you purchased them for my company'? He said that did not he? A. I don't remember the details of any of this conversation.

Q. Will you agree that he said it or that he might have said it? A. He might have said it at that time.

Q. And you said, 'I am not sure. I got the money out of the bank. I cannot recall the vehicles'. Did you say that? A. That is quite reasonable.

Q. And that Mr. Vouden said, 'Are you sure there were two vehicles, or have you just taken the money'? A. The answer is the same to all these questions.

Q. That he might have? A. That he may have.

Q. You said, 'I have been very worried over my business. I cannot remember'? A. Which is the truth.

Q. You said it? A. Yes. If it was at that time, it could be correct. I do not think it was, but I could not deny it.

Q. Did he say to you, 'I don't believe that. You have taken the money, and I want it immediately'? He said that, did not he? A. I don't think so.

Q. Would you deny it? A. The same answer. I don't remember".

.....

"Q. On the 16th March at Mr. Vouden's office do you remember he showed you this hire purchase agreement? A. No I don't.

Q. Do you deny it? A. I don't remember the occasion well enough to deny it.

Q. So it might have happened? A. I was certainly under discussion at some time.

Q. And that he said to you, 'What became of this vehicle'? A. He must have been speaking quickly in the time I was there to say all these things.

Q. I am merely asking you whether he said it, whether you deny that he said, whether you admit that he said it? A. It is possible, is my answer, but I don't think so.

Q. He said to you, 'When you left me on the 15th February, 1956, I gave you to understand that the

amount of £270 was to be paid to the company for the sale money of the vehicle. It has not been paid, and I want the money'? A. Did not you say Mr. Vouden showed me a document?

Q. Mr. Seddon said this, I am suggesting. A. No, that is quite wrong.

Q. Will you deny it or might it have happened? A. I would deny that. I do not think he would have said it. I am trusting to my memory.

Q. But you could be wrong, and he might have said it and you have forgotten? A. I don't think so. I very much doubt it".

As appears these passages relate to the interview which the appellant had at the respondent's premises on the 16th March, but the concluding part of Seddon's statement relates to a discussion which he said he had at the appellant's premises on the following day, Saturday 17th March 1956. That such an interview took place was sworn to at the trial by Seddon and as far as we can see this evidence was not denied. It is true that the appellant swore in his evidence in chief during the course of his case that he did not know that the cheques which he had given in relation to this transaction had been dishonoured until after proceedings against him had been commenced. But there can be no doubt, in the circumstances as they existed, that the appellant knew that his liability in respect of the two cars was still outstanding and in the absence of any specific denial that there was a conversation with Seddon at his premises on the 17th March 1956 about this liability we are quite unable to see any ground to justify a conclusion that the final part of Seddon's statement was deliberately false or for asserting that Seddon did not believe that the account which he gave was other than honest. Nor do we see that the circumstance that Seddon's statement fixed the date of the transaction as the 7th March 1956 and not earlier affords any evidence of malice. He was concerned with the investigation of a number of transactions and it was not improbable that he relied upon the date shown on the appellant's cheques to assist him in fixing the date of this particular transaction

and that this led to the error which he made. But whether this be so or not the error is quite consistent with faulty recollection on his part and the fact that the statement was erroneous on this point provides no ground, in our view, for a finding that it was a deliberately false statement.

There are also further difficulties in the way of the appellant in relation to these counts. As we have already said there was insufficient evidence that Seddon had authority to institute or initiate the proceedings in question on behalf of the respondent. But even if this view be erroneous, the evidence, again, does not permit of the conclusion that Seddon, rather than Vouden, initiated these charges. Indeed, there is no evidence that Seddon was acquainted with the precise nature of the four charges which were, in fact, formulated and laid by the police in relation to those matters. In those circumstances Seddon's knowledge and belief is not of much consequence in the case for what must be found in the evidence is evidence of malice and want of reasonable and probable cause on the part of the company (cf. The King v. Australasian Films Limited (29 C.L.R. 195 at pp. 198-200, 217-218)). We should add that the proceedings at the trial gave no clue whatever to the evidence which was adduced by the police at the committal proceedings. Nor was there any evidence at the trial to show what information the investigating police officers obtained before the date upon which these charges were respectively laid. As already appears two of the charges were laid on the 18th April 1956, two on the 27th June 1956 and two were laid by direction of the magistrate at the conclusion of the committal proceedings on the 4th September 1956. What we do know, however, is that between the 16th March and the 18th April the police officers made further enquiries from persons other than Vouden and Seddon, including the appellant himself, and that it was on the strength of the whole of the information in their possession that the charges in question were laid. In these circumstances it was, we think,

very difficult for the appellant to establish want of reasonable and probable cause at the date when the charges were laid. Particularly is this so when, as appears, the whole of this information is said to have been placed before the police prosecuting staff for the purpose of formulating appropriate charges (cf. Glinski v. McIver ((1962) 2 W.L.R. 832 at p. 839)). We do not mean to suggest that this latter circumstance is by any means conclusive on the point but it is, we think, a relevant circumstance for consideration. Where, as in the present case, officers of police have, apparently, made a complete investigation, the information obtained has been examined by the police prosecuting staff and persons interested in maintaining the prosecution have been informed that the facts support the charges made, the onus of proving want of reasonable and probable cause and malice on the part of those who are said to have instigated the charges may be thought to rest somewhat more heavily. And when upon a claim for malicious prosecution the plaintiff, as here, does not attempt to show what material was before those who formulated the charges and advised that the available material supported them the usual basis for a finding of malice or want of reasonable and probable cause is missing. Accordingly, if these issues are to be resolved in favour of the plaintiff evidence capable of justifying findings favourable to him must be found extraneously. In our view, there is no such evidence in the present case and the appeal should be dismissed.

ATKINSON

v.

CUSTOM CREDIT CORPORATION LIMITED

JUDGMENT MENZIES J.

ATKINSON

v.

CUSTOM CREDIT CORPORATION LIMITED

The appellant, a used-car dealer, brought an action against the respondent finance company in the Supreme Court of New South Wales claiming damages for malicious prosecution. In the declaration there were fourteen counts each relating to a particular prosecution and in each count it was alleged - with inaccuracy except possibly as to the first - that the defendant "appeared before a Justice of the Peace and charged the plaintiff with an offence". In fact, it was only with regard to the offence to which the first count related that the person who laid the charge was a servant of the respondent. The proceedings in relation to that offence were instituted by an information sworn by one Vouden upon which a warrant was issued. Two of the charges (viz. those referred to in counts 6 and 8) were directed by the magistrate conducting the preliminary hearing in lieu of charges which he then and there dismissed (viz. those referred to in counts 13 and 14). The remaining eleven charges were laid by police officers. The appellant was committed for trial upon twelve charges but in no case was a bill filed.

At the trial of the action the learned presiding judge, having ruled that there was no case on count 9, submitted to the jury the following set of questions in relation to each of the thirteen counts left to it:-

(1) Did the defendant, through its employees, actively set in motion the proceedings against the plaintiff?

(2) Did the defendant at the relevant times believe in the charges that were preferred?

(3) Was the defendant, through its servants or agents, actuated by malice in bringing this prosecution?

With these questions the jury was handed the following notes for its guidance:-

"This is an action to recover damages for malicious prosecution, a civil wrong, which is a remedy for unjustifiable criminal proceedings. To succeed the plaintiff has to establish the following elements in his cause of action:

(1) That the defendant, through its servants, actively set in motion the proceedings against the plaintiff.

(2) Termination of the proceedings in favour of the plaintiff.

(3) Absence of reasonable and probable cause.

(4) Malice in the sense of an improper purpose motivating the prosecutor.

It is admitted on the pleadings in this case that the proceedings terminated in favour of the plaintiff. Guilt or innocence is not an issue for the jury to determine.

If the jury will answer the questions, then it will be possible for the Judge to determine whether or not he will direct a verdict for the plaintiff or for the defendant on any one or more of the counts and if he directs a verdict for the plaintiff on any one or more of the counts, then the jury will be further charged in respect of damages."

In relation to each count the jury answered the questions as follows: (1) Yes. (2) No. (3) Yes. His Honour thereupon had the question of damages submitted to the jury and ruled that the jury should not return a separate verdict on each count but that the course to be followed in awarding damages was "to deal with it in globo and to return a general

verdict". What happened when the jury returned appears from the following passage from the transcript:-

"HIS HONOUR: Gentlemen, I rule that there was no reasonable and probable cause for the defendant to commence these proceedings. On your answers I ask you to return a verdict for the Plaintiff. Would you please do so?

FOREMAN: We do so, Your Honour.

HIS HONOUR: What amount of damages do you find?

FOREMAN: We have reached agreement on the amount of £25,000".

Judgment in the action was then entered for the plaintiff for £25,000 damages. The respondent appealed to the Full Court seeking judgment in its favour or, alternatively, a new trial. In accordance with the decision of the majority (Brereton and Wallace JJ.) it was ordered "that the several verdicts found by the jury in favour of the plaintiff be set aside and verdicts on those counts be entered for the defendant". Walsh J. considered that the verdicts on all counts should be set aside, except on the ninth count, on which a verdict was entered for the defendant and that there should be a verdict for the defendant entered on counts 1, 2, 3, 4, 10 and 12 and a new trial generally should be had of the issues arising under counts 5, 6, 7, 8, 11, 13 and 14.

In the course of his judgment Brereton J. pointed out that the case proceeded with complete disregard for the pleadings and on the basis that the defendant instigated the laying of the charges other than the first. His Honour went on to say:- "It proceeded, moreover, not on the basis that the defendant instigated a prosecution, in general terms, which resulted in individual charges, but on the basis that the defendant instigated each individual charge; and it was so

left to the jury. However attractive, or indeed reasonable and proper, it may appear to deal with the questions of instigation, reasonable and probable cause, and malice, in relation to the prosecution, in globo, regarding it as being, on the appellant's part, a single act of setting the criminal law in motion, and not fourteen separate acts, it is not, I think, open to us to do so; the matter was not litigated in that way, and neither party now suggests that it should be. They have chosen their field of battle; the appellant accepted the respondent's challenge; and it is impossible to know what difference there might have been in the conduct of either party's case had all the counts except the first been, in effect, if not in fact, incorporated into one. There is no escape, as I see it, from the separate consideration of these topics in relation to each count". His Honour also observed that on the issue of absence of reasonable and probable cause the learned trial judge had indicated "that in the way that the case had been fought, the only issue was the subjective one that is, whether Seddon and Vouden" (who were servants of the respondent) "believed in the charges . . . It does appear both from a perusal of the appeal book, and from what was said before us, that the matter litigated was the subjective element in reasonable and probable cause, that is to say whether the prosecutors did in fact believe in the respondent's guilt; and that we can and must proceed on the basis that objectively, reasonable and probable cause was either not disputed or not shown to be lacking".

From all this it appears that it is now necessary for this Court to deal with each count. I do so on the footing that all the proceedings against the appellant terminated in his favour and that, wherever it is necessary to determine whether a finding of lack of reasonable and probable cause for a prosecution was open, this must be determined by deciding whether the jury could reasonably have found that Seddon and

Vouden did not believe in the appellant's probable guilt - the finding which was, as has already been shown, the basis for the learned judge's ruling. It is on this not altogether satisfactory basis - see Glinski v. McIver 1962 2 W.L.R. 832, particularly at pp. 850, 851, 857 and 858 - that I proceed to deal with this appeal which, as I see it, is in substance concerned with the question whether the appellant is entitled to a new trial on counts 5, 6, 7, 8, 11, 13 and 14 or any of them - that is the point of difference in the Full Court.

It is necessary in the first place to give some general account of the business relationship existing between the appellant and the respondent out of which the charges arose. The appellant dealt in used motor-cars and the respondent financed him in his business. It is not necessary to describe the various ways in which this financing was done; it is sufficient to say that the goal of securing that the respondent had property in the vehicles for the purchase of which it provided money while it could be made to appear to any prospective purchaser that the vehicle in which he was interested was not the respondent's property resulted in some chicanery and that bills of sale and moneylenders' legislation induced the parties to cast transactions which would otherwise have taken the form of simple loans into very much more elaborate dealings. In the result the business relationship between the respondent and the appellant appears to one unfamiliar with the jungle of the used-car trade to have been one in which reality was so far removed from form that in dealing with commonplace matters such, for instance, as whether a jury could find that a departure by the appellant from the formal relationship would be likely to give rise to a genuine belief on the part of the servants of the respondent that the appellant had committed a crime, it would be other-worldly to insist upon applying the standards that do fortunately govern straightforward business dealings.

Righteous indignation at one another's shifts and stratagems could easily appear to a jury of men of simplicity as something quite foreign to the catch-as-catch-can methods of a business relationship which provided the community with a used-car lot such as that which it appears was operated by the appellant with the respondent's financial backing. It follows that, although no doubt by some of the transactions with which we are concerned the appellant disposed of some of the respondent's cars as though he himself owned them and failed to account for the proceeds, and that by other transactions the appellant obtained money from the respondent upon undertakings which he disregarded, the jury might nevertheless conclude that the appellant's dealings would appear to the respondent's servants as mere irregularities and that evidence that such irregularities were regarded as crimes by those servants would be received with a good deal of scepticism. This case, therefore, is essentially one where the problem is always whether there was evidence upon which a jury, disbelieving the respondent's evidence, could find that the elements necessary for the appellant's success in an action for malicious prosecution were proved. As I have said, each count has to be examined upon its own merits.

The first question is whether the jury's answer to question No. 1 (viz. that the defendant, through its employees, did actively set in motion the proceedings against the plaintiff) was open upon the evidence.

If it were merely a question whether the jury had evidence upon which they could find that the servants of the respondent began the prosecution, I would readily enough answer it affirmatively except as to the charges made by the magistrate himself. As to these (viz. the subject matter of counts 6 and 8), I am satisfied that there was no evidence upon which the respondent could be treated as prosecutor.

As to the others, there were three officers involved. First there was Maine, who at the relevant time was both Regional Manager for New South Wales and Queensland for the respondent company and Acting Manager for New South Wales, and it is clear he exercised authority over Seddon, who was Credit Manager, and Vouden, who was Office Manager. It seems that Seddon and Vouden having reported to Maine that the appellant could not account for some stock, Maine on Friday, 16th March 1956, with Seddon and Vouden present interviewed the appellant and demanded that he should fix up his outstandings immediately and that, when he asked for time, Maine directed Seddon and Vouden as follows: "Go out and get the cars at once, this afternoon, and then go to the Police, we have had too much trouble with these dealers and we will make an example of this fellow". Thereupon the cars owned by the respondent in the possession of the appellant were taken from the premises and on Monday, 19th March, the police were called in and were interviewed by Seddon and Vouden. On 20th March Vouden swore an information prepared by the police and the magistrate before whom the information was laid for fraudulently omitting to account for £495 lent in respect of a Ford Consul car. Upon that information a warrant for the arrest of the appellant was issued. Thereafter Seddon and Vouden kept in touch with the police and provided them with documents and statements upon which eleven other charges were framed and laid. On 18th April the police laid eight charges; on 27th June they laid another three charges and, at the hearing before the magistrate on 4th September, the appellant was charged with two further crimes. Except as to these last two charges, I consider the jury could find that Maine, Seddon and Vouden caused the appellant to be prosecuted as he was. The jury had, I think, material upon which to find that the prosecution of the appellant was part

of the process which Maine determined upon of making an example of the appellant.

The point was taken, however, that whatever Maine or Seddon or Vouden did, there was no evidence that they or any of them had any authority from the respondent to bring about the prosecution of the appellant. It seems to me, however, that Maine's position as Regional Manager and Acting Manager for New South Wales was of itself enough to give rise to the inference that Maine had the authority he purported to exercise. Here the following evidence he gave upon cross-examination is material:-

"Q. Why did you call in the Police?

A. Because I thought this was a matter that we should make the Police aware of.

Q. Supposing they decided criminal charges were tenable?

A. I do not know whether they would decide that or not.

Q. Do you mean to say you did not look beyond notifying the Police as to what might happen next?

A. No, I felt Mr. Atkinson had misappropriated our money or vehicles and I had had the whole weekend to think of this and I thought 'We should do something about this', or 'I should do something about this'.

Q. Since you believed there had been misappropriation didn't you believe the Police might also think something like that?

A. I didn't know what the Police might think.

Q. Do you swear you do not know that?

A. I swear that I did not know what the Police would think. They might say 'It is a charge' they might not.

Q. You in your mind were convinced it was a charge of misappropriation?

A. To my mind I was convinced our money had been misused.

Q. And you swear you do not know or would not have any opinion as to what action the Police would take?

A. Yes, I do swear that.

Q. Did you not have any opinion as to what action they might take?

A. I thought they might take some action.

Q. Which would be a criminal proceeding?

A. I am not aware of that.

Q. You are not aware that when you call the Police in to investigate what you thought was fraud they might not take criminal proceedings? Is that what you say?

A. Yes.

Q. What did you think they might do? Issue a summons and sue him in the civil courts?

A. Yes.

. . . . . .

Q. Did you ever think it would be a good idea to make an example of him for other dealers?

A. No.

Q. Are you sure, Mr. Maine?

A. Quite sure.

Q. Did it ever pass through your mind?

A. No".

At this point it is necessary to say that I do not find in the powers of attorney given by the respondent to

Seddon and Vouden on 25th August 1955 any authority to commence criminal proceedings on behalf of the respondent and that I rest my conclusion wholly upon the character of the office held by Maine and upon the directions that he gave to his subordinate officers Seddon and Vouden. It appears to me that there comes a point where authority to do a particular thing can be inferred from the position that a man who purports to exercise it holds in an organization and when a company operates throughout the country and is regionally organized, once it is established that an officer is the company's regional manager, authority to deal with the sort of problem which must constantly arise in the conduct of the company's business in that region can be legitimately inferred from the holding of such an office of responsibility.

The authorities upon the question whether it may be inferred from a servant's position that he has power to arrest or institute proceedings against wrongdoers, such as Bank of New South Wales v. Owston L.R. 4 App.Cas. 270, do not, I think, afford much assistance in deciding this case. As was pointed out in that case at p. 288, "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". Nor did it so in that case, for all that was said was that it should not be inferred merely from his position that the manager of a branch of the bank had authority to institute criminal proceedings on behalf of the bank. Their Lordships did say at p. 289: "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". These observations indicated that each case must be looked at upon its merits and no hard-and-fast rule can be laid down. Moreover, in that case the actual decision was that there should be a new trial because the learned presiding judge himself decided the question of authority and did not leave it to the jury. Their Lordships said: "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". This shows how much a question such as arises here is a matter for the jury. It is essentially a matter of degree and here I think it would have been legitimate for the jury to infer that Maine had authority to do what he did in dealing with the problems arising out of the appellant's breaches of his obligations to the company.

Except, therefore, as to counts 6 and 8, I do not think there should be judgment for the respondent on the ground that there was no evidence that the respondent was responsible for the prosecutions. I do not think, however, that the verdict can possibly stand. The jury was wrongly directed that the powers of attorney themselves conferred whatever authority was necessary and accordingly the jury did not consider whether authority should be inferred from Maine's position in the respondent's organisation and his directions to Seddon and Vouden. It will, however, be necessary to deal

later on with the order that should be made.

Coming now to the problem whether there was sufficient evidence of absence of reasonable and probable cause for the prosecution, what has to be considered is, as I have already pointed out, whether there was any evidence upon which the jury could find that Seddon and Vouden did not believe that the appellant was probably guilty of the offences covered by counts 1 to 5 inclusive, 7 and 10 to 14 inclusive.

Both Seddon and Vouden swore that they genuinely believed the appellant to be guilty of the criminal offences with which he was charged, but the jury must be taken to have rejected that evidence. This rejection did not of itself warrant the jury finding the absence of honest belief. If there is evidence of that, it must be found elsewhere.

There is no lack of authority for what is after all but a common-sense proposition that the absence of reasonable and probable cause for prosecuting may be inferred from the fact that the prosecutor or some person for whom the prosecutor is responsible has made false statements in aid of the prosecution. See, for instance, Glinski v. McIver 1962 2 W.L.R. 832, at p. 852, and the cases there cited by Lord Denning. Where, as here, the issue of reasonable and probable cause has been made to depend wholly upon the presence or absence of honest belief in the probability of guilt, the absence of such belief may, in accordance with the foregoing principle, be shown by evidence of statements deliberately false in some material particular. Evidence of this sort falls, I think, within the category of what Lord Radcliffe in Glinski v. McIver at p. 846 described in the following words: "If there really is some evidence founded on speech, letters or conduct that supports the case that the prosecutor did not believe in his own charge, the plaintiff is, in my view, entitled as of right to have the jury's finding upon it".

The question here is whether there is any such evidence. What is relied upon by the appellant is the discrepancy between the statements of Seddon and Vouden to the police upon which the charges were based and the true facts, and the argument is that the giving of false information evidenced a lack of genuine belief in the appellant's guilt. If it was open to the jury to find that false information was deliberately given, there was, I think, evidence upon which the jury could find the absence of honest belief in guilt once Seddon's and Vouden's own evidence was rejected.

The judgments of the members of the Full Court have satisfied me in relation to the charges covered by counts 1, 2, 3, 4, 10 and 12 there was no evidence from which the absence of belief in guilt could be reasonably inferred. I confine myself, therefore, to those counts upon which there was a difference of opinion in the Full Court - that is, counts 5, 6, 7, 8, 11, 13 and 14.

To adopt the words of Brereton J.:- "The 5th, 6th and 13th counts concern the Jaguar (ACX-462) and relate to charges of (i) obtaining it by false pretences (ii) Stealing it and (iii) Obtaining it by means of a valueless cheque. The 7th, 8th and 13th counts relate to the same charges and concern the Ford Customline (AZB-838)". The 11th count "concerned a charge of fraudulent misappropriation of the sum of £270 being the net proceeds of sale of an MG car (AWG-204)". The six counts 5, 6, 7, 8, 13 and 14 can be dealt with together. These charges were based upon a statement made to the police by Seddon at a date that it is not possible to fix accurately but the date is not vitally important because there was evidence that both Seddon and Vouden approved of the charges which the police formulated. Seddon's statement appears in the transcript as Exhibit O and there is no doubt that it does contain errors. The

significance of these errors can, I think, only be appreciated after some statement of the facts relating to the dealings with the Jaguar and Ford Customline cars.

Both cars were owned by the respondent and were in the possession of persons holding them under hire purchase agreements made in Victoria. The respondent repossessed the cars in New South Wales and stored them with the appellant, the Ford Customline on or about 8th February 1956 and the Jaguar on or about 15th February 1956. So much is common ground. There were then some negotiations between the appellant and Seddon about both cars. The appellant's account was that Seddon told him that the cars were Victorian repossessions and would have to be sold at auction and asked him to clean them up and get them into the auction. He said he did this and the cars were submitted at auction on 1st March in his name. At the auction offers were made and he referred these to Seddon who, upon being told that the appellant would be satisfied with £5 for each car for his services, told him to let them go for the prices offered. He, the appellant, then in a day or two received from the auctioneers a cheque for £1,170, the price of the cars. He put that cheque into his own account and then on 7th March he handed Seddon, for the respondent, his own cheques for £815 and £345, the auction prices of the cars less £5 in each case. These cheques were dishonoured. The appellant swore that he first heard from Seddon that the cheques had been dishonoured on 18th April. The foregoing evidence was given as part of the appellant's examination in chief. In cross-examination he denied that he was selling the cars on behalf of the respondent and said he bought the cars from the respondent before their sale at auction on 1st March and that the cheques were given in payment for the cars. He admitted that on 7th March his account upon which the cheques were drawn was overdrawn to the extent of £415 and on the day upon which the cheques were

presented (namely 17th March) the account was overdrawn £960. It is obvious that the appellant's account of the transaction was not very satisfactory but eventually it amounted to this, that the prices that could be obtained for the cars at auction having been ascertained, he then bought each car for £5 less than its auction price and paid for them some seven days later by cheques which he knew would be dishonoured but that he did not learn that they had been dishonoured on 17th March until a month later on 18th April. Seddon's account of the transaction in evidence was to the effect that, when both the cars were at the appellant's premises, he asked the appellant whether he was interested in buying them and the appellant then offered £345 for the Jaguar and £815 for the Ford Customline. Then about the end of February or the beginning of March he telephoned the appellant and told him that he had heard from Melbourne and accepted his offers. So it was that the sales were then made. Seddon's evidence of what took place on 7th March at his office was as follows:-

"Q. What conversation took place on that occasion?

A. He came in and he said, 'Here is my cheque for the Jaguar and the Ford'.

Q. Are those the two cheques that he gave you, in Exhibit U?

A. Yes.

Q. Did you have any conversation with him about it? Did you say anything about the cheques when he handed them to you?

A. I said, 'Thank you. Will the cheques be all right, Les?'

Q. What did he say?

A. He said, 'Yes, they will be 100 percent.'"

Seddon swore that he learned on 17th March that the cheques had been dishonoured and that he then had the following conversation with the appellant:-

"Q. What did you say?

A. I said, 'Those two cheques you gave me for those two Melbourne vehicles have been returned'. He said, 'I have been expecting them to come back'.

Q. Did you say anything further when he said that?

A. Yes. I asked him what he had done with the vehicles.

Q. Did you say anything about the cheques then or anything that had been said previously - did you mention that?

A. Yes. I said he had said that they would be all right at the time of settlement.

Q. What did you then ask him?

A. I asked him what he had done with the vehicles.

Q. What did he say?

A. He said, 'I have sold them through Auto Auctions'.

Q. What did you say then?

A. I said, 'If you sold them through Auto Auctions you must have been paid for them'. He said, 'Yes'. I said, 'Well, what have you done with the money?' He said, 'I don't know. It has just gone'".

The two accounts which I have just outlined are, of course, widely divergent but they have this in common, that the sale of the two cars to the appellant took place at the very end of February or at the very beginning of March and not on 7th March when the appellant gave Seddon the two cheques. Seddon's account in evidence would not support charges of obtaining the vehicles by false pretences as to

the cheques which were given on 7th March (counts 5 and 7), yet on 18th April such charges were laid. Later, on 27th June 1956 charges of passing valueless cheques to obtain the cars were laid, and later still, on 4th September 1956 charges of stealing them were made at the instance of a magistrate. These last charges can be omitted from consideration for, as I have said, they were not the responsibility of the respondent. The charges of obtaining the cars by false pretences (counts 5 and 7) and those of obtaining the cars by passing valueless cheques (counts 13 and 14), which the magistrate dismissed, were, however, the respondent's responsibility for the reasons I have already given.

It is at this point that it is necessary to look at what Seddon told the police. His statement was to the effect that on or about 15th February he offered to sell the two cars to the appellant and a few days later the appellant telephoned him and said, "My offer is £815 on the Ford and £345 for the Jaguar". The statement then proceeded:-
"I said 'I can't accept the offer at the moment as these are both Melbourne accounts, I will contact Melbourne and see if they will accept your offer'. On the 7th March, 1956, I saw the Defendant at my Office and I said 'I have received confirmation from Melbourne respecting the Ford and the Jaguar car, they will accept your offer on both vehicles'. Atkinson said 'Good, I will write you cheques for them'. He then wrote out two cheques in my presence both dated the 7.3.56, one for the amount of £815, other for £345, drawn on the Australian and New Zealand Bank Limited, Burwood Branch, signed by Atkinson, drawn on his No. 2 Account

CHEQUE PRODUCED D851562 £815
CHEQUE PRODUCED D851563 £345

He handed them to me. I said 'I suppose these cheques will be alright, Les'. Atkinson said 'They are O.K., a 100 per cent'".

It is apparent that this statement affords the explanation why it was that the appellant was charged with obtaining the vehicles by false pretences as to the cheques and with obtaining vehicles by passing valueless cheques. What now requires consideration is whether, from the falsity of the statement made to the police, the jury could infer that Seddon had no genuine belief in these charges. In my opinion, they could. The statement negatives any sale before 7th March and asserts that Seddon did not know that the cars had been sold by auction on or about 1st March. The jury could, of course, find that in these respects the statements were untrue but, furthermore, I consider that, having heard Seddon in the witness box, they could have come to the conclusion that his statement to the police was deliberately untrue and his errors were not the result of inadvertence. In the witness box Seddon said:-

"Q. You made a statement to the Police in respect of this matter, didn't you?

A. Yes.

Q. That is in Exhibit O. (Approaches witness). Is that the statement you made?

A. Yes.

Q. Was that statement true?

A. Yes, to the best of my knowledge".

His last statement to the jury was obviously disbelieved and the jury was well justified in doing so, but the point for present purposes is that Seddon did not give any exculpatory explanation of his false statement; rather he asserted that what he had said was true to the best of his knowledge when he knew, as his own evidence showed, that previously to 7th March he had sold the cars to the appellant. Accordingly

I agree with Walsh J. that there was evidence from which the jury could find that Seddon at no time had an honest belief that the appellant had obtained the Ford Customline or the Jaguar car by false representations as to the cheques he gave on 7th March or by passing valueless cheques on that date. Furthermore, in addition to what I have said previously, I consider that the jury could infer that the charges 5, 7, 13 and 14 were charges made by the police for which Seddon, by his untrue statement, was responsible. The evidence does not reveal why charges 13 and 14 were laid on 27th June 1956 or why they were dismissed by the magistrate but, because it is an element of the offence created by s. 178B of the Crimes Act that the offender should obtain some "chattel money or valuable security" by passing a valueless cheque, these charges depended as much upon Seddon's statement as did charges 5 and 7. I therefore prefer the judgment of Walsh J. to that of Brereton J. and that of Wallace J. in relation to counts 5, 7, 13 and 14 and for the foregoing reasons I have come to the conclusion that there was evidence upon which the jury could answer question 2 as it did in relation to these four charges.

It follows, too, that the same is true with regard to question 3, for malice can be inferred from the making of a deliberately false statement to bring about a prosecution. It is therefore unnecessary to consider whether there was any other evidence of malice in relation to these charges although I am disposed to think a finding of general malice was open to the jury.

I come now to count 11, which was that the respondent had maliciously and without reasonable and probable cause brought about the prosecution of the appellant for fraudulently misappropriating £270 in relation to an MG car AWG-204. This charge was also based upon Seddon's statement to the police. In this he said that he sold the appellant

an MG car for £300 upon a deposit of £30 and the signing of a hire purchase agreement for the balance but that this sale was subject to a stipulation that, if the appellant sold the car within the period of the hire purchase agreement, he would immediately pay the balance to the respondent and that this was agreed to. A hire purchase agreement with a term of one month was produced to the police. Seddon's statement to the police is part of Exhibit O. A close examination of his evidence satisfied me that it was to the same effect as his statement. In these circumstances I do not think that even if the jury disbelieved his evidence - which was contradicted by the appellant - there was any ground for its coming to the conclusion that when Seddon made the statement he had no genuine belief that the appellant was guilty of misappropriating the £270. Such a conclusion could not be drawn merely from the weakness of the case. As to this count, therefore, I agree with the judgments of Brereton J. and Wallace J. rather than with that of Walsh J.

In the result I consider that the Full Court was correct in setting aside the jury's verdict but that, instead of entering judgment for the respondent on all counts, a new trial should have been ordered upon counts 5, 7, 13 and 14 relating to the Ford Customline and the Jaguar cars. To this extent in my opinion this appeal should succeed.

ATKINSON

v.

CUSTOM CREDIT CORPORATION LIMITED

JUDGMENT WINDEYER J.

ATKINSON

v.

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I agree in the conclusion of my brothers Taylor and Owen, whose judgment I have read. The relevant facts are so fully set out and discussed by them that it is quite unnecessary for me to go into details. There are, however, some general observations that I would make. I am not satisfied that, in the circumstances of the business in which the respondent was engaged, it was outside the scope of the authority of those of its servants who set the criminal law in motion to do what they did. That is not because the powers of attorney authorized the commencement of criminal proceedings. They did not. But on general grounds I do not think that it appears conclusively that what was done was not within the scope of the duties of those concerned. For the consequences of what they did the respondent might therefore, I think, be made responsible if in doing it they acted tortiously. However, as I see it, there was no evidence which could justify a jury finding that what was done was done maliciously or without reasonable and probable cause.

It is not surprising that in the argument before us the appellant, appearing in person, tried to shew that there was an innocent explanation of each transaction in respect of which he had been committed for trial. And having regard to the involved, and in some respects devious, ways in which the respondent had apparently conducted some of its dealings with the appellant, his assertion that he had no criminal purpose and had not fraudulently departed from a course of dealing

which he understood the respondent had approved, could I shall assume be correct. Indeed that much must be assumed, for although the magistrate committed him for trial, the Attorney-General did not file a bill, and the proceedings thus terminated in his favour. But there seems to me to be a want of evidence to support the view that the proceedings were, in whole or in part, commenced in such circumstances as would support an action for malicious prosecution. It seems to me a mistake to treat the case as a number of separate and isolated matters each in its own compartment. The attitude of mind of those concerned in invoking the police and in supplying the police with information ought not, I think, to be judged by a meticulous and isolated examination of each separate transaction which, as a result of the police inquiries, was ultimately made the subject of a particular charge. But, even if the several matters be so separately regarded, the evidence, I think, falls short in each case of what would be required to have enabled a jury to find for the appellant. I need say no more, for, as I have said, I agree with the analysis of the transactions made by my brothers Taylor and Owen.