

"It is impossible to enumerate as a distinct proposition what is or is not probable cause; which has made me doubt, or at least regret, probable cause being matter of law." (a) "The existence of 'reasonable and probable cause' is an inference of fact. It must be drawn from all the circumstances of the case. I regret, therefore, to find the law to be that it is an inference to be drawn by the judge and not by the jury." (b)

One of the inconveniences arising from this departure from ordinary practice was pointed out by Lord Colonsay in the case last cited, viz., that the rule according to which the existence of probable cause was established by shewing a state of circumstances upon which a reasonable and discreet person would have acted involved the anomaly that the judge had to determine, not what impression the circumstances would have made on his own mind, he being a lawyer, but what impression they ought to have made on the mind of another person, probably not a lawyer. A more serious defect in the doctrine is that the result of allowing it to operate in connection with the rule, already referred to (sec. 2 ante), that the jury are entitled to consider the absence of probable cause among the circumstances bearing upon the question whether the defendant was actuated by malice is that, as was pointed out in a recent case, there may be two different and opposite findings in the same cause upon the same question of probable cause, one by the jury and the other by the judge. (c)

(a) *Broughton v. Jackson* (1852) 18 Q.B. 378, per Lord Campbell.

(b) *Lister v. Perryman* (1870) L.R. 4 H.L. 521, per Lord Westbury. Compare the remarks of Lord Chelmsford (p. 535), who said he was at a loss to understand in what other sense the existence of probable cause could be termed a question of law than that it was determined by the judge, and pointed out that the effect of the rule was that a verdict in cases of this description was only nominally the verdict of a jury. Lord Hatherley also regretted that the question of probable cause should not be left to the jury who, as they heard the evidence and saw the demeanour of the witnesses, would be in a good position to judge what degree of trust it was reasonable and proper that the person to whom the information was given should repose in his informant.

(c) *Hicks v. Faulkner* (1881) 8 Q.B.D. 167. "Absence of reasonable cause," said Hawkins, J., "to be evidence of malice, must be absence of such cause in the opinion of the jury themselves, and I do not think they could properly be told to consider the opinion of the judge upon that point if it differed from their own—as it possibly might, and in some cases probably would—as evidence for their consideration in determining whether there was malice or not. In no case, however, will their finding relieve the judge of the duty of determining for himself the question of reasonable cause as an essential element in the case. Want of reasonable cause is for the judge alone to determine upon the facts found, for the jury even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he bona fide believed to be