

diction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that the judge is called upon to submit any question to the jury."

The converse situation which demands the interposition of a jury has been thus described by one of the most eminent of modern English judges:

"If there be facts in dispute upon which it is necessary he should be informed in order to arrive at a conclusion on this point, those facts must be left specifically to the jury; and when they have been determined in that way, the judge must decide as to the absence of reasonable and probable cause. (g)

It is obvious that the rule by which, so long as the facts are not in dispute, a judge has a right to decide, without the intervention of a jury, whether there was probable cause, involves, as a legitimate corollary, the doctrine that this question must remain one for the judge, although the undisputed facts adduced by each party separately point to different conclusions. In other words, although the judge is not entitled to pronounce upon the effect of evidence which is conflicting in the sense that more than one inference may be drawn from it, he is warranted in determining the effect of evidence which is conflicting in the sense that the materials furnished for the decision consist of distinct groups of specific facts, of which one establishes and the other negatives the existence of probable cause.

Hence, where a witness who has given testimony which justifies the inference that the defendant had probable cause for preferring a charge is unimpeached in his general character, and uncontradicted by testimony on the other side, and there is no want of probability in the facts which he related, a judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly, even though, up to the time when the witness had so testified, the evidence put in showed *prima facie* a want of probable cause. (h)

(g) *Brown v. Hawks* (1891) 2 Q.B. 718, per Lord Esher (p. 726). Compare the statements that the opinion of the jury must be taken if the facts are contradicted, or not of that distinct character that there can be no question as to the correct inference to be drawn from them: *Erickson v. Brand* (1888) 14 Ont. App. 614, per Osler, J. A. (p. 654); and that it is not the judge's province to decide contradictory facts and form conclusions as to the weight of evidence and the credibility of witnesses: *Hamilton v. Cousineau* (1892) 19 Ont. App. 203. [In this case the dissent of Burton, J. A., was merely on the ground that the facts were really undisputed, and not upon general principles.]

(h) *Davis v. Hardy* (1827) 6 B. & C. 225. The effect of this decision has been said in a Canadian case to be that, although the evidence offered by the plaintiff shows, in the opinion of the presiding judge, a want of reasonable and probable