the defendant. But malice, however clearly proved, is not evidence of the want of probable cause. (*g*)

The practical significance of this distinction, however, is greatly limited by the fact that the existence or absence of a bona fide belief on the defendant's part that the plaintiff had rendered himself amenable to the suit for the institution of which the action is brought is the most essential element in the determination not merely of the question whether the defendant acted without reasonable and probable cause (see sec. 6 post), but also of the question whether he acted maliciously, (*h*) and that this latter question is exclusively for the jury. (*i*) It is obvious that if the jury are permitted to consider the want of probable cause as evidence tending to establish malice, and are told that such want is conclusively established by evidence of the defendant's disbelief in the plaintiff's guilt or knowledge of his innocence, they will naturally be led to treat this common ingredient of bona or mala fides as a connecting link between the two issues upon which the case depends, the result being that malice will in effect be treated as evidence of want of probable cause. Indeed, there is a manifest logical inconsistency in a doctrine which declares, on the one

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have a criminal investigation in order to clear up other circumstances, no action would lie, because malice would necessarily be negatived: *Shrosbery* v. *Osmaston* (C.P.D. 1878) 37 L.T.N.S. 792. In *Winfield* v. *Kean* (1882) 1 Ont. R. 193, a new trial was granted on account of charge that, "if this information was laid without there being proper cause, the result would be that it would be laid maliciously." The court said that, though there was other evidence on which the jury might have found malice, it was not so cogent as to make it apparent that the jury were not influenced by the misdirection. In *Hicks* v. *Faulkner* (1881) 8 Q.B.D. 167, Hawkins, J., in commenting upon the argument of plaintiff's counsel that if the trial judge ought to have told the jury there was want of probable cause that of itself was evidence of malice, said: "I do not agree in this. It is true, as a general proposition, that want of probable cause is evidence of malice; but this general proposition is apt to be misunderstood. In an action of this description, the question of malice is an independent one—of fact purely—and altogether for the consideration of the jury, and not at all for the judge. . . . If among the circumstances it appears to the jury that there was no reasonable ground for a prosecution, they may, though by no means bound to do so, well think that it must have been dictated by some sinister motive on the part of the person who instituted it." A finding that the defendant honestly believed the plaintiff to be guilty amounts to an acquittal with regard to the inference of malice, which it was open to the jury to have drawn from the absence of probable cause; and where there is no other evidence of sinister or indirect motive, the judgment must be for the defendant, in spite of another finding that there was malice: *Brown* v. *Hawks* (C. A. 1891) 2 Q.B. 718.

(*g*) *Johnstone* v. *Sutton* (1786) 1 T.R. 493 (p. 543); *Wright* v. *Greenwood* (1852) 1 W.R. 393; *Whalley* v. *Pepper* (1836) 7 C. & P. 506 (where Tenterden, C.J., rejected evidence of expressions of general malice uttered by defendant); *Hamilton* v. *Cousineau* (1892) 19 Ont. App. 203, per Burton, J. A. (p. 231); *Crawford* v. *McLaren* (1859) 9 U.C.C.P. 215.

(*h*) *Gibbons* v. *Alison* (1846) 3 C.B. 181 (p. 185); *Stewart* v. *Beaumont* (1866) 4 F. & F. 1034; *Stockley* v. *Hornidge* (1837) 8 C. & P. 11; *Riddell* v. *Brown* (1864) 24 U.C.Q.B. 90.

(*i*) *Michell* v. *Williams* (1843) 11 M. & W. 205, and cases cited in secs. 6 (g), 10 (c), post.