

the defendant's part that the plaintiff was guilty is the turning point of the case, direct the jury to find for or against the defendant, according as they are of opinion that he did or did not entertain such belief (*j*) A similar course may be pursued where the essential question is whether the belief was justifiable.

Thus, in an action for maliciously indicting the plaintiff on a charge of assault, where the evidence is that the assault was committed in removing the defendant from the plaintiff's premises, after he had refused to leave them, the case is properly submitted to the jury, where the judge states that, if they thought the indictment was preferred by the defendant with a consciousness that he was wrong, it is without reasonable or probable cause; but that, if more violence was used than was necessary, there was reasonable and probable cause for the prosecution. Alderson, B., said: "This is tantamount to calling on the jury to inquire whether or not the facts are such that no reasonable man could have supposed the assault to be excessive. If that be the result of the facts, there was clearly no reasonable and probable cause for laying the indictment." (*k*)

A referee's finding of want of reasonable or probable cause is not a finding of law, but is equivalent to a verdict for the plaintiff, rendered by a jury, under instruction by a judge as to what would be evidence of reasonable and probable cause. (*l*)

13. The anomalies of the accepted doctrine have not infrequently been the subject of judicial comment. The most obvious objection to it, of course, is that it assigns to the court the function of drawing inferences from the specific testimony presented, and thus does violence to the most characteristic of all the principles by which the common law system of procedure is regulated.

(*j*) *Winfield v. Kean* (1882) 1 Ont. R. 193; *Milner v. Sanford* (1893) 25 Nov. Sc. 227. Where the evidence raises the question whether the defendant believed and had reasonable ground for believing that the plaintiff was guilty of theft, as where both parties claim the land from which the articles (fence poles) were taken, it is not error to leave the case to the jury, telling them what would or would not be probable cause, according to the inferences they might draw from the facts as to the defendant's motives and belief: *Alward v. Sharp* (1868) 1 Hannay (N.B.) 286.

(*k*) *Hinton v. Heather* (1845) 14 M. & W. 131. Rolfe, B., pointed out that, although a finding that there had been no excess would not necessarily show that there was not probable cause, a finding for the plaintiff on this direction implied that there was no excess, and that the defendant knew there was no excess. In *Shrobsbery v. Osmaston* (C.P.D. 1878) 37 L.T.N.S. 792. Denman, J., thought that the question whether the belief of the defendant was warrantable should be put to the jury in this form: Were the circumstances such that a reasonably fair person, acting with a fair and unprejudiced mind, would have acted on them and considered them as sufficient cause for acting.

(*l*) *Fawcett v. Winters* (1887) 12 P.R. (Ont.) 232.