

able person believe the truth of the charge, but that he knew of those facts at the time the charge was laid, and that this knowledge was the reason and inducement for putting the law in motion. (g)

25. Divisibility of issues.—That an indictment for perjury was preferred without probable cause is sufficiently proved, where evidence is given which shews that some of the charges in the indictment were without probable cause, though there was probable cause for several of the other assignments. (a) On the other hand, an indictment containing several assignments of perjury upon several parts of the plaintiff's examination constitutes but one charge: and the preferring of that charge without probable cause constitutes but one cause of action. The plea of Not Guilty denies that one cause of action, and amounts to an assertion that the defendant had probable cause for the whole of the indictment. That is one entire issue: and if there was a want of probable cause for any part of the charge, the plaintiff is entitled to a verdict. Whether there was or was not probable cause for other parts of the charge may affect the damages, but cannot affect the verdict, or shew that the defendant had properly preferred the indictment, that is, with probable cause for every part of it. (b)

26. Questions which cannot be raised for the first time on an appeal

—In an action for malicious arrest the defendant cannot succeed in bane in nonsuiting the plaintiff, or in obtaining a new trial, on the ground that no probable cause was shewn, if he did not make this objection at the trial, or in applying for a new trial. (a)

The objection to an action for unlawfully, &c., arresting the plaintiff without a warrant was really an action of trespass, and, therefore, should have gone to the jury, on the question of justification as well as on the other issues, cannot be taken for the first time on appeal (b).

(g) *Delegat v. Hightley* (1837) 3 Bing. N.C. 950.

(a) *Reed v. Taylor* (1812) 4 Taunt. 616. Where the plaintiff, after giving evidence to shew that, as to one of several arguments of perjury, the charge was malicious and without probable cause, rests his case, and obtains a verdict, a new trial will not be granted on the theory the defendant was not permitted to shew that there was reasonable and probable cause for the charge contained in the other assignment: *Ellis v. Abrahams* (1846) 8 Q.B. 709. These decisions were followed in *Wilson v. Tennant* (1843) 25 Ont. R. 330, where the prosecution was for the theft of certain specified articles; and the court (Meredith, J., diss.) upheld the ruling of the trial judge that the action was maintainable because the evidence shewed that there was no probable cause for the prosecution in respect to some of the articles. The fact that as to others there was such cause only affected the amount of damages.

(b) *Delisier v. Towne* (1841) 1 Q.B. 313. Where the plaintiff on the trial proves want of reasonable cause as to one assignment only, and takes a verdict in respect to that, he is not entitled to costs in respect to the assignments as to which damages were not given, and the defendant is not entitled to the costs of the defence prepared by him in respect of those assignments: *Ibid.*

(a) *Jones v. Duff* (1848) 3 U.C.Q.B. 143.

(b) *Donnelly v. Bawden* (1877) 40 U.C.Q.B. 611.

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