

the question of probable cause to the jury, telling them, if they should find in one way as to that fact, then, in his opinion, there was no probable cause, and their verdict should be for the plaintiff; if they should find in the other way, then there was, and their verdict should be for the defendant. (e)

In various judgments we find passages like these :

"The jury must first find the facts which are supposed to constitute the probable cause." (f) "If the facts are doubtful, the jury must come to the conclusion of fact before the judge determines the effect of it in law." (g) "If the existence of the facts relied on by the plaintiff be a question, then the jury must decide upon it, and, upon that finding, the judge declares the law." (h)

That these remarks, however, are not to be construed as laying down any general rule as to a definite succession of time, and merely mean that disputed facts must be settled by the jury at some stage of the proceedings before the judge can draw his inferences as to the existence or absence of probable cause, is apparent from the cases above cited. That is to say, a judge is not obliged to give a ruling that there was no reasonable and probable cause before he asks the jury whether there was malice. He may ask the jury to find and answer different questions, and get such and such answers, and on those answers he can say whether there is or is not such cause. (i)

A practical application of these general principles is that a judge may, where the existence or non-existence of a belief on

(e) *Blackford v. Dod* (1831) 2 B. & Ad. 1; approved in *Riddell v. Brown* (1864) 24 U.C.Q.B. 90. In another early case Park, J., after remarking that it is the province of the judges to determine, as a point of law, whether there was probable cause, proceeded thus: "But as that must be compounded of the facts, and as the jury must decide on them, my practice has been to say: 'You are to tell me whether you believe the facts stated on the part of the defendant, and, if you do, I am of opinion that they amount to a reasonable and probable cause for the step he has taken.' I do not direct a nonsuit, because the facts are so closely connected with the law": *Davis v. Russell* (1829) 5 Bing. 354. A more succinct statement is that "the judge is to give his opinion on the law, and to leave the jury to determine the facts": *Taylor v. Williams* (1831) 2 B. & Ad. 845; 6 Bing. 183, holding that a summing up properly separates the law from the fact where the judge tells the jury that, if they think the prosecution had a certain motive for his conduct, then there was probable cause; but, if he had not that motive, then there was no probable cause."

(f) *Davis v. Russell* (1829) 5 Bing. 354.

(g) *Broad v. Ham* (1839) 5 Bing. N.C. 722, per Bosanquet, J.

(h) *Torrance v. Jarvis* (1856) 13 U.C.Q.B. 120.

(i) *Shrobsbery v. Osmaston* (C.P.D. 1876) 37 L.T.N.S. 792, per Lindley, J.