

are then properly left to the jury is simply equivalent to laying down for a special case the rule explicitly formulated in many of the older decisions that the assistance of the jury must be called in when any of the facts upon which the existence of probable cause depends are in dispute (see ante). There is, in fact, nothing in the *Abrath Case* to shew that there was any intention to modify the established doctrine that the final determination of the main issue, whether there was probable cause, rests with the court whether the jury is or is not asked to settle any of the subordinate issues. Indeed, it is inconceivable that if the Court of Appeal and the House of Lords had had such an intention, they should not have made some reference to the explicit re-affirmations of the old rule a few years previously in *Lister v. Perryman* (see above). It is wholly impossible, moreover, to reconcile Mr. Stephen's theory with the rulings and *dicta* in *Brown v. Hawks* (see sec. 11, sub-sec. e, post), a case more recent than that on which his main reliance is placed.

10. When the trial judge should take the opinion of the jury.

The application of the rule established by the cases cited in the last section involves no difficulty up to a certain point. If the facts on which the existence of probable cause depends are not in dispute, there is nothing for him to ask the jury, and he should decide the matter for himself. (a)

A new trial should be ordered where the judge left it to the jury to say whether there was reasonable and probable cause for arresting the plaintiff, (b) or, as it has been expressed in another case, where it was left to the jury to say whether the facts which were proved and which were known to the defendant at the time he caused the plaintiff to be apprehended, were sufficient to cause a reasonable and cautious man acting bona fide, and without prejudice, to suspect the plaintiff of the offence charged. (c)

(a) *Brown v. Hawks* (1891) 2 Q.B. 718, per Lord Esher; *Broad v. Ham* (1839) 5 Bing. N.C. 722, per Bosanquet, J. Where the plaintiff gives no proof of facts indicating a want of probable cause, the judge's decision may be rendered on motion for a nonsuit: *Torrance v. Jarvis* (1856) 13 U.C.Q.B. 120. The fact that the defendant fails to prove certain of the circumstances which he alleged in his plea as showing the existence of probable cause does not preclude the operation of the usual rule that it is for the court to determine whether the matters proved constitute probable cause, nor prevent him from amending the plea so as to correspond with the proof by striking out some allegations and qualifying another: *Hailes v. Marks* (1861) 7 H. & N. 56. Bramwell, B., said: "It is not the question upon what he acted, but whether he had reasonable and probable cause for acting; and, if he had, he is justified, though he had, or said he had, some further cause."

(b) *Hill v. Yates* (1818) 8 Taunt. 182; *Panton v. Williams* (Exch. Ch. 1841) 2 Q.B. 169.

(c) *West v. Baxendale* (1850) 9 C.B. 141. When evidence has been given which, as matter of law, constitutes want of probable cause, and the judge first