

tion to certain characteristics of this normal citizen. In suits for negligence, he is conceived of solely as a person whose assumed constant discharge of the obligation of using due care furnishes a standard by which to gauge the quality of the specific acts which constitute the subject-matter of the litigation. In suits for the wrongful use of legal process, on the other hand, although the question whether this obligation has been fulfilled often becomes an important element in the investigation (sec. 7, e, post), he is on the whole viewed rather in his capacity as a person who possesses the faculty of estimating with reasonable accuracy the evidential value of the circumstances presented for his consideration. Or, to put the matter in a slightly different form, the essential question in the one case is, what the typical citizen would do, as a prudent man, in the ordinary affairs of everyday life, while in the other the question is, what inferences he would draw in a quasi-judicial capacity from certain facts. The parallelism thus indicated possesses more than a merely speculative importance, since it indicates the reasons why both the law of negligence and the law of probable cause constitute two of the most unsystematic chapters of our jurisprudence. In the latter instance, it should be noted the perplexities of the subject have been indefinitely augmented by the peculiar procedure which reserves to the judge what is essentially a question of fact (see III. post). From a juristic standpoint, therefore, the decisions as to the existence or non-existence of probable cause in particular cases really stand upon no higher plane than the verdicts of juries.

**2. Proof of want of probable cause, an essential pre-requisite to the maintenance of the action**—That the one essential and indispensable pre-requisite to the establishment of the plaintiff's right to recover damages for the wrongful use of legal process is that he shall prove it to have been used without reasonable or probable cause is well settled. (a) The importance thus ascribed to this element of

(b) In *Lister v. Perryman* (1870) L.R. 4 H. L. 521, Lord Colonsay declared that, upon a careful consideration of the decisions, it seemed to him impossible to deduce any fixed and definite principle to guide and assist the judge in any case that might come before him, and that Chief Justice Tindal's rule (see above) seemed to be the only one that could be resorted to.

(a) "The essential ground of the action is that a legal prosecution was carried on without a probable cause": *Johnstone v. Sutton* (1786) 1 T.R. 493, per Lords Mansfield and Loughborough (p. 543); S.P. *Jones v. Givin* (1712) Gilbert's R.B. 185 (p. 201).