

It should be noted that the judge's inference as to the existence or non-existence of probable cause is really an inference of fact, and not of law (*i*). In *Lister v. Perryman* (*j*) Lord Chelmsford, after remarking that this question was one for the court, said :

"In what other sense it is properly called a question of law, I am at a loss to understand. No definite rule can be laid down for the exercise of the judge's judgment. Each case must depend upon its own circumstances, and the result is a conclusion drawn by each judge for himself, whether the facts found by the jury, in his opinion, constitute a defence."

In Scotland the existence of probable cause is a question for the jury. (*k*)

In Quebec, the question appears to be still an open one. (*l*)

In his treatise on Malicious Prosecution (ch. vii.), Mr. Stephen has undertaken to prove that "by successive judicial decisions the practical burden of deciding whether or not the plaintiff has shewn a want of reasonable cause has been in effect transferred to the jury." The gist of his argument is that the logical consequence of the decisions of the Court of Appeal and the House of Lords in *Abrath v. North-Eastern R. Co.* (*m*) is that any judge is "entitled" to put to the jury the questions, whether the defendant took reasonable care to inform himself of the true state of the case, and whether he honestly believed the case which he laid before the magistrate, and that, as these questions cover the whole ground of reasonable cause, the judge is virtually bound to render judgment for or against the plaintiff, according as a negative or affirmative answer is returned. The vice in the learned author's reasoning lies in the assumption that this case can be construed in such a sense as to warrant a judge in taking this course under all circumstances. Clearly he can be justified in doing this only when the evidence presented is such as to make the correct answer to these questions a disputable point. That this must frequently, or, possibly, in most instances, be the situation created by the submission of the testimony, may be readily conceded, but to assert that these issues

(*i*) *Hicks v. Faulkner* (1881) 8 Q.B.D. 167, per Hawkins.

(*j*) (1870) L.R. 4 H.L. 521 (p. 535). In the same case Lord Colonsay suggested (p. 539) that the rule which makes the existence of probable cause a question for the court is accounted for by the "anxiety to protect parties from being oppressed or harassed in consequence of having caused arrests or prosecutions in the fair pursuit of their legitimate interests, or as a matter of duty, in a country where parties injured have not the aid of a public prosecutor to do these things for them."

(*k*) *Lister v. Perryman* (1870) 4 L.R.H.L. 521, per Lord Colonsay (p. 539).

(*l*) See *Drolet v. Garneau* (1884) 10 Que. L.R. (Q.B.) 139.

(*m*) (1883) 11 Q.B.D. 440; 11 A.C. 247.