

IV. BURDEN OF PROOF.

(See also Subdivision VI.)

14. As to probable cause, generally—It is well settled that the onus of shewing that there was a want of reasonable and probable cause rests, in the first instance, upon the plaintiff, though the result of this rule is that he is required to prove a negative. (a) In other words, if the plaintiff merely proves his innocence, and gives no evidence of the circumstances under which the prosecution was instituted, he must fail. (b)

In *Hicks v. Faulkner* (c) Hawkins remarked, obiter, that there is this recognized distinction between actions for false imprisonment and malicious prosecution that, in the former action, the onus lies on the defendant to plead and prove the existence of reasonable cause as his justification, while, in the latter action, the plaintiff must allege and prove affirmatively its non-existence. No authorities are cited by the learned judge, and the present writer has not been able to find any trace of this doctrine in other cases. It is certainly not easy to see upon what rational ground a distinction can be drawn in this regard between cases in which the accused is actually incarcerated and those in which he is subjected to the expense and scandal of criminal proceedings. (d)

The general rule evidently involves the corollary that the jury should be told that if they are left in doubt, after hearing the evidence, the verdict should be for the defendant. (e)

Agreeably to the usual principle which prevails where a party has the burden of proving a negative, the plaintiff can only be called

right in the interests of justice." In *Quartz Hill, &c., Co. v. Eyre* (1883) 11 Q.B.D. 674 (p. 687) Brett, M.R., was inclined to agree with the doctrine of Huddleston, B. in the case just cited, (see pp. 174, 175 of the report), that the jury are not bound by the holding of the judge as to the absence of reasonable cause.

(a) *Lister v. Perryman* (1870) 4 L.R.H.L. 521 (pp. 537, 542).

(b) *Abrath v. North-Eastern R. Co.* (1883) 11 Q.B.D. 440. "If the indictment be found by the grand jury, the defendant shall not be obliged to shew a probable cause, but it shall lie on the plaintiff's side to prove an express rancour and malice": *Savill v. Roberts* (1800) 1 Salk. 13; 1 Lord Raymond 374; *S. P. Henderson v. Midland R. Co.* (1871) 20 W.R. 23; *Hicks v. Faulkner* (1881) 8 Q.B.D. 167; *Raymond v. Biden* (1892) 24 Nov. Sc. 363; *Lefebvre v. Compagnie de Nav.* (1879) 9 L.C. Leg. News (S.C.) 547; and the cases cited passim in this and the next sub-division.

(c) (1881) 8 Q.B.D. 167.

(d) In Canada it has been held that actions for malicious arrest and for malicious prosecution stand on the same footing as regards the onus of proof of probable cause and malice: *Sherwood v. O'Reilly* (1846) 3 U.C.Q.B. 4. See also *Lefebvre v. Compagnie de Navigation* (1879) 9 L.C. Leg. News (S.C.) 547.

(e) *Hicks v. Faulkner* (1881) 8 Q.B.D. 167.