Conversely, it is settled that the omission to obtain such an opinion tends strongly to shew that the moving party in the former suit knew that he was acting unjustifiably in instituting it. Thus, the fact that an attorney did not take advice as to the meaning of doubtful provisions in the Bankruptcy Act, and insisted on a written admission by the debtor of the legality of the proceedings as a condition for sparing his property, are material upon the question, whether he acted in good faith in causing the debtor to be afterwards adjudicated a bankrupt. (*m*)

In the latter case the fundamental doctrine that the existence of probable cause is to be tested by considering whether the circumstances within the knowledge of the defendant were such that a person of average intelligence would have drawn the same inferences as he did, seems to involve the corollary that, where the purely legal elements of the case are in nowise doubtful, and the liability of the party against whom the proceedings are taken depends upon questions of fact merely, the opinion of a professional man cannot, upon any sound principles, be regarded as an absolute justification for such proceedings any more than the opinion of a layman.

"Parties cannot create probable cause by referring to others, whether they be the most practised attorneys or the most experienced counsel; and there are strong reasons why this should not exempt them from responsibility." (*n*)

This rule, however, is subject to a reasonable qualification where a lawyer undertakes, as the agent of the moving party, to

(1891) 21 Ont. R. 388. [Question submitted was whether goods clandestinely removed belonged to the tenant or to the landlord, the prosecutor]. *Crawford* v. *McLaren* (1859) 9 U.C.C.P. 215. [Advice of counsel taken as to effect of instrument]. In Nova Scotia the advice of a solicitor is merely evidence tending to disprove malice: *Seary* v. *Saxton* (1896) 28 Nov. Sc. 278 per Graham, J., (p. 289) distinguishing English cases where a barrister was consulted.

(*m*) *Johnson* v. *Emerson* (1871) L.R. 6 Exch. 329 (p. 354) per Cleasby B.

(*n*) *Clements* v. *Ohrly* (1847) 2 C. & K. 686. [Where counsel had given his opinion that similarity of handwriting was sufficient to constitute probable cause for an arrest for forgery]. That the fact of having obtained opinion of counsel does not negative malice, was settled so long ago as 1813: *Hewlett* v. *Cruchley* (1813) 5 Taunt. 111. In *Nourse* v. *Calcott* (1856) 6 U.C.C.P. 14, a verdict for the plaintiff was set aside because the defendant was proved to have acted on the opinion of a lawyer that a clandestine removal of goods was made with a fraudulent intention. But this decision seems to ascribe too much importance to the opinion of a non-official lawyer. A case where an agent of the State, like a District Attorney, is consulted and declares his belief that a former discharge of the plaintiff had been secured by false testimony, stands on a different footing: *Rice* v. *Saunders* (1876) 26 U.C.C.P. 27.