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REASONABLE AND PROBABLE CAUSE IN ACTIONS FOR MALICIOUS PROCEDURE.

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In the following article we propose to state the effect of the English and Canadian cases in which the defence of reasonable and probable cause has been discussed. As the decisions by the courts of the Dominion on this important subject have never before been brought together, we hope that the present collection of authorities will be especially useful to our readers.

I. GENERAL PRINCIPLES.

1. Standard to which reasonable and probable cause is referred – The method pursued by the courts in determining whether one person had reasonable and probable cause for putting the law in motion against another is to some extent analogous to the method by which the existence or non-existence of actionable negligence is ascertained. In both instances the situations upon which the liability of the defendant hinges are, as indicated by the terminology employed in describing them, incapable of being defined by any fixed legal standard, and the test applied is conformity or non-conformity to a certain hypothetical course of conduct which a typical citizen would, as may be supposed, have pursued under the circumstances.

"In order to justify a defendant there must be reasonable cause, such as would operate on the mind of a discreet man; there must also be probable cause, such as would operate on the mind of a reasonable man, at all events such as would operate on the mind of the party making the charge; otherwise there is no reasonable cause as to him." (*a*)

The essential distinction, however, between the ultimate objects of the inquiries in the two classes of cases involves the consequence that a different degree of importance is attached in each investiga-

(*a*) Tindal, C.J., in *Broad* v. *Ham* (1839) 5 Bing. N.C. 722 quoted, with approval by Lord Chelmsford and Lord Colonsay in *Lister* v. *Perryman* (1870) L.R. 4 :I.L. 521.

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 K.B. 185 (p. 201).

probable cause depends upon considerations which are thus set forth by one of the most eminent of modern judges:

"In its very nature the presentation or the prosecution of an indictment involves damage, which cannot be afterwards repaired by the failure of the proceedings to the fair fame of the person assailed, and for that reason, as it seems to me, the law considers that to present and prosecute an indictment falsely, and without reasonable or probable cause, is a foundation for a subsequent action for malicious prosecution." (*b*)

A corollary from this principle is that, although a plaintiff must fail unless he shows that the use of process was both malicious and without reasonable and probable cause, (*c*) or, in other words, that it should have been without reasonable ground and from a bad motive, (*d*) the demonstration of each of these facts is by no means of equal importance to him. Want of probable cause is competent, (*e*) though not conclusive (*f*) evidence of the malice of

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(*b*) Bowen, L.J., in *Quartz Hill, &c., Co.* v. *Eyre* (1883) 11 Q.B.D. 674 (p. 691).

(*c*) *Chambers* v. *Taylor* (1598) Croke Eliz. 900: *Anon* (1702) 6 Mod. 73: *Anon* (1702) 6 Mod. 25: *Jones* v. *Givin* (1712) Gilbert's K.B. 185 (p. 189): *Golding* v. *Crowe* (1751) 1 Sayer's Rep. 1: *Farmer* v. *Darling* (1776) 4 Burr. 1971: *Johnstone* v. *Sutton* (1786) 1 T.R. 493 (p. 543): *Mitchell* v. *Jenkins* (1833) 5 B. & Ad. 588. *Broad* v. *Ham* (1839) 5 Bing. N.C. 722: *Brown* v. *Hawks* (C.A. 1891) 2 Q.B. 718, and cases cited throughout this article, *passim*.

(*d*) *Johnson* v. *Emerson* (1871) L.R. 6 Exch. 329, per Cleasby B. (p. 342).

(*e*) "Every other allegation may be implied from this [i.e., the want of probable cause]; but this must be substantively and expressly proved, and cannot be implied." *Johnstone* v. *Sutton* (1786) 1 T.R. 493, per Lords Mansfield and Loughborough (p. 543). See also p. 545 of the same judgment. To the same effect see *Purcell* v. *McNamara* (1808) 9 East 363: *Phillips* v. *Naylor* (1850) 4 H. & N. 565: *Busst* v. *Gibbons* (1861) 30 L.J. Exch. 75: *Quartz Hill, &c., Co.* v. *Eyre* (1883) 11 Q.B.D. (C.A.) 674, per Brett, M. R. (p. 687): *Wilson* v. *Winnipeg* (1887) 4 Man. L.R. 193: *Vincent* v. *West* (1868) 1 Hannay (N.B.) 290: *Seary* v. *Saxton* (1896) 28 Nov. Sc. 278: *Larocque* v. *Willett* (1874) 23 L.C. Jur. (Q.B.) 184. In a recent case in the Court of Appeal, Bowen, L.J., remarked that the doctrine by which the non-existence of reasonable and probable cause is some evidence from which the jury may infer malice is based on the idea that, if there is an absence of reasonable and probable cause, the jury may think that the defendant knew there was no such cause: *Brown* v. *Hawks* [C.A. 1891] 2 Q.B. 718 (p. 727). See also the remarks of Hawkins, J., at p. 723. A single sentence in a charge: "If you find an absence of reasonable and probable cause, you can infer malice," is not a sufficient explanation of the doctrine that malice in fact may be inferred from all the circumstances which led to the institution of the prosecution: " *Hawkins* v. *Snow* (1895) 27 Nov. Sc. 408.

(*f*) *Mitchell* v. *Jenkins* (1833) 5 B. & Ad. 588: *Huntley* v. *Simson* (1857) 2 H. & N. 600, per Channell, B. (p. 602): *Tulley* v. *Corrie* (1867) 10 Cox C.C. 584. Want of reasonable cause does not justify an inference of malice on the defendant's part where a prosecution was instituted by his agent, without his authority and while he was living at a distance, and he only became cognizant of the facts when he attended the first hearing before the magistrate: *Weston* v. *Beeman* (1857) 27 L.J. Exch. 57. Where a man prosecutes unsuccessfully without believing in the guilt of the accused, and simply for the reason that there are circumstances of suspicion so great that he may have felt it his duty to

the defendant. But malice, however clearly proved, is not evidence of the want of probable cause. (*g*)

The practical significance of this distinction, however, is greatly limited by the fact that the existence or absence of a bona fide belief on the defendant's part that the plaintiff had rendered himself amenable to the suit for the institution of which the action is brought is the most essential element in the determination not merely of the question whether the defendant acted without reasonable and probable cause (see sec. 6 post), but also of the question whether he acted maliciously, (*h*) and that this latter question is exclusively for the jury. (*i*) It is obvious that if the jury are permitted to consider the want of probable cause as evidence tending to establish malice, and are told that such want is conclusively established by evidence of the defendant's disbelief in the plaintiff's guilt or knowledge of his innocence, they will naturally be led to treat this common ingredient of bona or mala fides as a connecting link between the two issues upon which the case depends, the result being that malice will in effect be treated as evidence of want of probable cause. Indeed, there is a manifest logical inconsistency in a doctrine which declares, on the one

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have a criminal investigation in order to clear up other circumstances, no action would lie, because malice would necessarily be negatived: *Shrosbery* v. *Osmaston* (C.P.D. 1878) 37 L.T.N.S. 792. In *Winfield* v. *Kean* (1882) 1 Ont. R. 193, a new trial was granted on account of charge that, "if this information was laid without there being proper cause, the result would be that it would be laid maliciously." The court said that, though there was other evidence on which the jury might have found malice, it was not so cogent as to make it apparent that the jury were not influenced by the misdirection. In *Hicks* v. *Faulkner* (1881) 8 Q.B.D. 167, Hawkins, J., in commenting upon the argument of plaintiff's counsel that if the trial judge ought to have told the jury there was want of probable cause that of itself was evidence of malice, said: "I do not agree in this. It is true, as a general proposition, that want of probable cause is evidence of malice; but this general proposition is apt to be misunderstood. In an action of this description, the question of malice is an independent one—of fact purely—and altogether for the consideration of the jury, and not at all for the judge. . . . If among the circumstances it appears to the jury that there was no reasonable ground for a prosecution, they may, though by no means bound to do so, well think that it must have been dictated by some sinister motive on the part of the person who instituted it." A finding that the defendant honestly believed the plaintiff to be guilty amounts to an acquittal with regard to the inference of malice, which it was open to the jury to have drawn from the absence of probable cause; and where there is no other evidence of sinister or indirect motive, the judgment must be for the defendant, in spite of another finding that there was malice: *Brown* v. *Hawks* (C. A. 1891) 2 Q.B. 718.

(*g*) *Johnstone* v. *Sutton* (1786) 1 T.R. 493 (p. 543); *Wright* v. *Greenwood* (1852) 1 W.R. 393; *Whalley* v. *Pepper* (1836) 7 C. & P. 506 (where Tenterden, C.J., rejected evidence of expressions of general malice uttered by defendant); *Hamilton* v. *Cousineau* (1892) 19 Ont. App. 203, per Burton, J. A. (p. 231); *Crawford* v. *McLaren* (1859) 9 U.C.C.P. 215.

(*h*) *Gibbons* v. *Alison* (1846) 3 C.B. 181 (p. 185); *Stewart* v. *Beaumont* (1866) 4 F. & F. 1034; *Stockley* v. *Hornidge* (1837) 8 C. & P. 11; *Riddell* v. *Brown* (1864) 24 U.C.Q.B. 90.

(*i*) *Michell* v. *Williams* (1843) 11 M. & W. 205, and cases cited in secs. 6 (g), 10 (c), post.

hand, that proof of the existence of a certain mental condition justifies the inference of malice, and asserts, on the other hand, that proof of malice is entirely inadmissible to establish a conclusion which is conceded to follow at once when that very mental condition is shown to have existed. Under these circumstances, the mere fact that the absence of belief is not the sole evidence by which malice may be shown is hardly a sufficient ground for wholly denying its competence for that purpose. The difficulties involved in the accepted doctrine and the extremely fine distinctions which it necessarily entails are indicated by a case in which the court, after laying it down that malice is not evidence of want of probable cause, conceded that, where an accusation is made upon information received from a dismissed servant of the plaintiff, and the facts stated by the informant are highly improbable, when the social position and antecedents of the plaintiff are taken into account, the jury are entitled to consider whether the defendant acted on the information owing to the state of feeling between him and the plaintiff, and not from any belief. (*j*)

3. The existence or absence of probable cause is a material question in every action, the object of which is to recover damages for any use of legal process which either imputes moral turpitude to the person against whom it is used or which has the special effect of impairing his financial standing in the community. (*a*) As regards the former class of actions, it is enough to say that the large majority of them relate to formal accusations of some positive breach of the criminal law, though, as the general principle requires, a remedy is also accorded where the act complained of is the procuring of the merely preliminary writ known as a search warrant, (*b*) which is tantamount to an expression of belief, or at all events strong suspicion, that the person against whom it is procured is implicated in the crime under investigation. The imputation of guilt being the essence of the injury which is supposed to result from the proceedings, it is quite immaterial, so far as the right to maintain the action is concerned, that

(*j*) *Wright* v. *Greenwood* (1852) 1 W.R. 393. See also the argument of Cockburn, C.J., in *Fitzjohn* v. *Mackinder* (Exch. Ch. 1861) 9 C.B.N.S. 505, for an interesting example of the manner in which the fact that belief is an element both in probable cause and in malice.

(*a*) According to Holt, C.J., in *Savil* v. *Roberts*, 1 Ld. Rayon 374, there are three heads of damage which will support an action for malicious procedure: (1) damage to a man's person, as when he is taken into custody, whether that be on mesne or on final process, or on a criminal charge; (2) damage caused by putting a man to expense; (3) damage caused by injuring a man's fair fame and credit.

(*b*) *Elsee* v. *Smith* (1822) 2 Chitty 304; *Young* v. *Nichol* (1885) 9 Ont. R. 347; *McNellis* v. *Gartshore* (1853) 2 U.C.C.P. 464.

by reason of some technical defect in those proceedings the complainant was not placed in actual jeopardy by the specific accusation complained of, as, for example, where he could not have been convicted because the indictment was bad. (*c*)

The rule by which the defendant in an action for which there was a probable cause cannot subsequently maintain a suit against the moving party is no less applicable to civil than to criminal proceedings. (*d*) But in its converse aspect this rule has a much more limited scope in civil than in criminal cases. As respects the former, the doctrine as recently laid down by Bowen, L.J., is that, "according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution." (*e*) The amiable fiction upon which the common law bases this rule is, it is hardly necessary to remind our readers, that the costs in which a plaintiff who fails in his suit is amerced are an adequate indemnity for the successful defendant.

In countries where the Civil Law, or any system based upon it, is administered, a different doctrine apparently prevails. Thus, by the law of the Province of Quebec an action can be maintained by a defendant who has succeeded in a civil action against one who maliciously and without reasonable and probable cause, or, in other words, has in bad faith and with the malicious intention of harassing his adversary unsuccessfully prosecuted the action. (*f*)

But for at least two hundred years (*g*) this doctrine, both in England and in the countries which have adopted the English

(*c*) *Jones* v. *Givin* (1712) Gilbert's K.B. 185 (p. 201): *Chambers* v. *Robinson* (1823) 2 Strange 691.

(*d*) *Baugh* v. *Killingworth* (1691) 4 Mod. 13: *White* v. *Dingley* (1808) 4 Mass. 433: Mellor, J., in *Parton* v. *Hill* (1864) 12 W.R. 753: *David* v. *Thomas* (1857) 1 L. Can. Jur. (Q.B.) 69.

(*e*) *Quartz Hill, &c., Co.* v. *Eyre* (1883) 11 Q.B.D. 674 (p. 690). See also *Johnson* v. *Emerson* (1871) L.R. 6 Exch. 329, per Martin, B. (p. 372): *Montreal, &c., R. Co.* v. *Ritchie* (1889) 16 Can. S.C. 622, per Strong, J. (p. 630). Originally the right to sue seems to have depended upon whether the plaintiff, in the first suit, actually knew that it was groundless: *Waterer* v. *Freeman* (1623) Hobart 266.

(*f*) Strong, J., in *Montreal, &c., R. Co.* v. *Ritchie* (1889) 16 Can. S.C. 622 (p. 630). See also *Labelle* v. *Martin* (1885) 30 L. C. Jur. (Cour de Rev.) 292.

(*g*) See remarks of Lord Camden in *Goslin* v. *Wilcock* (1766) 2 Wils. 302, and cases cited in sec. 8(g), post.

system of jurisprudence, has been subject to an exception in cases where, to use the language of Strong, J, there has been, "by means of civil process some unwarrantable interference with the person or property of the defendant in the original action."(*h*)

The most frequent illustrations of this principle are furnished by the cases in which the law permits the suit to be commenced by capias and followed by arrest. (*i*) An action can then be maintained, provided the plaintiff can show special damage. (*j*) (Specific decisions falling under this category will be noticed in sec. 7, post.)

Other civil suits for the institution of which the law grants a remedy where reasonable and probable cause is wanting are those which imply an inability to discharge pecuniary obligations, such as the presentation of bankruptcy petitions, (*k*) or petitions for winding up a company. (*l*)

4. How far the defendant is protected by the official intervention of the judge or other public functionary who authorized the proceedings—The doctrine established by the decisions seems to be that, as a general rule, the intervention of the public functionary, whether judge, magistrate or executive official, by whom, or at whose instance, the proceedings complained of were actually instituted and carried on, will or will not serve as a protection to the defendant in the subsequent action, according as such functionary is bound to set the law in motion, simply upon the applicants submitting facts which show that he has a prima facie right to the assistance of the State, or is under the obligation of examining into the truth of those facts and satisfying himself that the circumstances are as represented before the request of the applicant is granted.

(*h*) *Montreal, &c., R. Co.* v. *Ritchie* (1889) 16 Can. S C. 622 (p. 630).

(*i*) *Johnson* v. *Emerson* (1871) L.R. 6 Exch. 329 (p. 372), per Martin, B.

(*j*) *Jennings* v. *Florence* (1857) 2 C.B.N.S 467: *Churchill* v. *Siggers* (1854) 3 El. & Bl. 929. In the latter case Lord Campbell said: "The Court or Judge to whom a summary application is made for the debtor's liberation can give no redress beyond putting an end to the process of execution on payment of the sum due, though, by the excess, the debtor may have suffered long imprisonment and have been utterly ruined in his circumstances."

(*k*) *Johnson* v. *Emerson* (1871) L.R. 6 Exch. 329.

(*l*) *Quartz Hill, &c., Co.* v. *Eyre* (1883) 11 Q.B.D. (C.A.) 674.

Thus, on the one hand, where it is proved that the information contained the substance of the statement which the defendant made to the magistrate, the arrest is regarded as the direct consequence of the charge laid by the defendant. He is not protected merely for the reason that the information was laid by the advice of the magistrate, and that the defendant himself did not interfere in the issue of the warrant. (*a*) The operation of this principle is not affected by the fact that the party laying the information was bound over to prosecute. A man cannot excuse the prosecution of another person on a charge which he knows to be false, merely because, if he refuses to do so, he will suffer pecuniary loss by the forfeiture of his recognizance. The rule is the same, whether the defendant has, by preferring the charge before a magistrate, intentionally procured himself to be bound over, (*b*) or a judge has, of his own motion, bound him over to prosecute in consequence of his having given certain testimony regarding the plaintiff in the course of a previous trial to which they were parties. (*c*)

On the other hand, where a man only gives true information to a magistrate or other state official, who thereupon directs a prosecution, the man who merely gives the information is not responsible. (*d*)

Under the English Act of 1 & 2 Vict., ch. 110, abolishing arrest for debt on mesne process, but providing that, if a plaintiff shall, by the affidavit of himself or of some other person, shew to the satisfaction of a judge that he has a cause of action against the defendant to the amount of £20 or upwards, and that there is probable cause for believing that he

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(*a*) *Colbert* v. *Hicks* (1880) 5 Ont. App. 571. A representation by the moving party that he has reason to suspect that a crime has been committed is enough to justify the magistrate in issuing a search warrant: *Elsee* v. *Smith* (1822) 1 Dow & R. 97, or a warrant of arrest: *Davis* v. *Noake* (1817) 6 M. & S. 29.

(*b*) *Dubois* v. *Keats* (1840) 11 Ad. & E. 329.

(*c*) *Fitzjohn* v. *MacKinder* (Exch. Ch. 1861) 9 C.B.N.S. 505, diss. Blackburn and Wightman, JJ. The disagreement of the judges was upon the question whether the recognizance placed the defendant under compulsion to prosecute in such a sense that he was not responsible for the repetition of the false testimony which influenced the judge to direct the prosecution.

(*d*) *Johnson* v. *Emerson* (1871) L.R. 6 Exch. 329, per Cleasby, B. (344): *Lowe* v. *Collum* (1877) 2 L.R. Ir. 15. A justice has jurisdiction to issue a search warrant upon an information which merely alleges that a suspicion that a larceny has been committed. It is not necessary that it should allege that a larceny has in fact been committed: *Jones* v. *German* (1897) 1 Q.B. (C.A.) 374, affirming [1896] 2 Q.B. 418.

is about to leave England, the judge may direct that the defendant shall be held to bail, and the plaintiff may for that purpose sue out a writ of capias, the foundation of an action for malicious arrest is that the party obtaining the capias has imposed on the judge by some false statement, and has thereby satisfied him not only of the existence of the debt, but also that there was reasonable ground for supposing that the debtor was about to quit the country. No action, therefore, will lie where a plaintiff, without any fraud or falsehood and upon an affidavit fairly stating the facts, succeeds in satisfying the judge that the defendant is about to quit the country, even though he may not himself believe that the defendant is about to do so. (*e*)

Under sec. 10 of the Criminal Law Amendment Act of 1885, empowering a justice to issue a search warrant, upon information made before him on oath by any parent of any woman or girl, or any other person who, in the opinion of the justice, is bona fide acting in her interest, that there is reasonable cause to suspect that she is being detained for immoral purposes, the justice has a judicial and not a merely ministerial duty to perform, and where the applicant is acting bona fide, and has stated the matter fully, and the judge concludes that there is reasonable ground for suspicion, his conclusion is an answer to an action for maliciously procuring the issue of the warrant. (*f*)

Of course the applicant "is not responsible for the act of the judge which is, upon the face of the proceedings, an illegal one, if he has only stated the truth;" (*g*) as where a justice of the peace orders an arrest on a charge of felony, that being his own construction of the facts laid before him, and it turns out that the facts do not amount to a felony. (*h*)

Where the statement of facts by which the agent of the State was induced to set the law in motion against the plaintiff was false to the defendant's knowledge or not believed by him, he is

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(*e*) *Daniels* v. *Fielding* (1846) 16 M. & W. 200. Under that statute, the plaintiff in an action for malicious arrest should allege the facts, showing falsehood or fraud in obtaining the original order. But after verdict a declaration containing an allegation that the defendant "falsely procured" the judge to make the order for the capias will be held good, the words being taken to mean by false evidence: Ibid.

(*f*) *Hope* v. *Evered* (1886) 17 Q.B.D. 338.

(*g*) *Johnson* v. *Emerson* (1871) L.R. 6 Exch. 329, per Cleasby, B. (p. 344).

(*h*) *Leigh* v. *Webb* (1800) 3 Esp. 165; *Cohen* v. *Morgan* (1822) 6 Dow & R. S. A complaint to a magistrate which is merely to the effect that the plaintiff had "clandestinely removed and secreted" certain articles belonging to the defendant does not justify the magistrate in issuing a warrant to arrest the plaintiff and search his premises: *McNellis* v. *Gartshore* (1853) 2 Upp. Can. C.P. 364.

liable for the consequences, even if he would otherwise have been protected by the intervention of such agent. (*i*)

5. Arrest for felony without warrant, justifiability of— The rule is that where an arrest for felony is made without a warrant by a constable, he is protected if he can shew that he had reasonable cause to suspect that the felony had been committed, though, as a matter of fact, none had been committed. (*a*) But to justify a private individual in making such an arrest, he must not only make out a reasonable ground of suspicion, but also prove that a felony has been committed. (*b*)

(*i*) *Steer* v. *Scoble* (1623) Cro. Jac. 667. [Arrest of bail by creditor who knew that the principal had surrendered himself]: *Lowe* v. *Collum* (1877) 2 L.R. Ir. 15 [wilful misrepresentation that threatening letter was in the plaintiff's handwriting]. Compare cases, supra, as to position of defendant, who is bound over to prosecute. An allegation that the defendant falsely and maliciously, and without reasonable or probable cause, "caused and procured" the plaintiff to be adjudicated a bankrupt, is established by proof that the defendant petitioned for the adjudication, and by depositions, false in fact and maliciously made, induced the commissioner to adjudicate the bankruptcy, although it appears that, even if the depositions had been true, the adjudication could not have been supported in law: *Farley* v. *Danks* (1855) 4 El. & Bl. 493. Replying to the contention of counsel that "the adjudication ought to be a consequence necessarily and legally following from the facts, if true," Lord Campbell said: "All that is necessary is that the defendant should falsely and maliciously cause the act; and he does that when he swears falsely, and the act would not be done without his so swearing. . . . Where a man makes a true statement of fact, upon which the Court acts wrongly, the grievance, it is true, arises, not from the statement, but from the judgment; but it would be monstrous to hold that this is so where the statement is maliciously false." So, per Crompton, J.: "There is none the less wrong in causing the act to be done, because the act would be illegal at any rate. In a popular sense, a person who puts the law in motion causes the thing to be done." See, however, *Daniels* v. *Fielding* supra.

(*a*) *Beckwith* v. *Philby* (1827) 6 B. & C. 35; *Samuel* v. *Payne*, (1780) Dougl. 350; 4 Camp. 421: *Lawrence* v. *Hedger*, (1810) 3 Taunt. 13. Reasonable and probable cause exists for an arrest by a constable of a man suspected of a design to commit some act of violence when he and his brothers and some others have been previously convicted of similar offences, and a general terrorism prevails in the locality of so serious a nature that the military have been called out to restore order: *Donnelly* v. *Bawden* (1877) 40 U.C.Q.B. 611.

(*b*) *Beckwith* v. *Philby* (1827) 2 B. & C. 35: *Lyden* v. *McGee* (1888) 16 Ont. R. 105: 1 Hale P.C. 588: III. Russell on Crimes, p. 74. Where plaintiff, while passing along the street, pushes a drunken man from him, merely to avoid coming into contact with him, and the latter rolls against and breaks a shop window, the shopkeeper has probable cause for procuring plaintiff's immediate arrest, without a warrant, on a charge of disorderly conduct: *Barrette* v. *Turner* (1886) 9 L.C. Leg. News (S.C.) 314. In an action against a private party for false imprisonment, on a charge of felony not actually committed, evidence that the plaintiff was found under suspicious circumstances, and confirmed the suspicion by refusing to give an account of himself, goes in mitigation of damages: *Cowles* v. *Dunbar* (1827) 2 C. & P. 565: *Chinn* v. *Morris* (1820) 2 C. & P. 361. Compare also *Coyle* v. *Richardson* (1879) 2 L.C. Leg. News (S.C.) 60.

If a constable, instead of being simply requested by a complainant to take a designated person into custody, is given an opportunity of forming his own judgment upon the circumstances, he is responsible for making an arrest, if those circumstances were such that he should have seen that the charge was unfounded. (*c*)

II. WHEN REASONABLE AND PLOBABLE CAUSE EXISTS FOR SETTING THE LAW IN MOTION.

6. Existence or absence of probable cause, tested by existence or absence of justifiable belief on defendant's part that the plaintiff was amenable to the procedure complained of—The standpoint from which the common law regards the question whether there was reasonable and probable cause for the institution of the proceedings complained of is principally determined by two considerations: (1) That "it is of importance that prosecutions for offences should not be discouraged, and at the same time that the liberty of the subject should be protected;" (*a*) (2) That "if any man honestly believes that a crime has been committed by any person, it is not only his right but his duty to prosecute that man." (*b*) As Mr. Justice Cave observed in a recent case:

"In this country we rely on private initiative in most cases for the punishment of crime; and while, on the one hand, it is most important firmly to restrain any attempt to make the criminal law serve the purposes of personal spite or any other wrongful motive, on the other hand it is equally important, in the interest of the public, that where a prosecution honestly believes in the guilt of the person he accuses, he should not be mulcted in damages for acting in that belief, except on clear proof, or at all events reasonable suspicion of the existence of some other motive than a desire to bring to justice a person whom he honestly believes to be guilty." (*c*)

(*c*) *Hogg* v. *Ward* (1858) 3 H. & N. 417. An inspector of police is justified in arresting a woman on a charge of keeping a house of ill-fame, where a woman alleging herself to be a former inmate has signed an explicit statement recounting acts of her own which, if they were actually committed, justify the charge: *Archibald* v. *McLaren* (1892) 21 Can. S.C. 588.

(*a*) Lord Kenyon in *Smith* v. *MacDonald* (1799) 3 Esp. 7. Some older cases went so far as to lay it down that actions for malicious prosecution were not to be favoured: *Savile* v. *Roberts* (1708) 1 Salk. 14; 1 Raym. 374; Carth. 416: *Reynolds* v. *Kennedy* (Exch. Ch. 1748) 1 Wils. 233.

(*b*) Mathew, J., in *Vagg* v. *Hemp* (1887) 4 Times L.R. 52.

(*c*) *Brown* v. *Hawks* (1891) 2 Q.B. 718 (p. 723). Compare the remarks of Bramwell, B., in *Darling* v. *Cooper* (1869) 11 Cox Cr. Cas. 533, and of Lord Colonsay in *Lister* v. *Perryman* (1870) L.R. 4 H.L. 521.

From these principles, it follows that the existence or absence of reasonable and probable cause must be determined by inquiring, in the first place, whether or not the moving party actually believed the other party to be amenable to the proceedings complained of, (*d*) and, in the second place, supposing that issue to be settled in favour of the moving party, by inquiring whether his belief was justifiable under the circumstances. (*e*)

When approached from one side, these inquiries present no difficulties. It is easy to define what the moving party is *not* obliged to establish. Thus, so far as regards criminal proceedings are concerned, it is evident that, under any possible theory of the adequacy of a justification, we must assume that, as has been explicitly laid down in one case, the existence of probable cause is shewn where evidence sufficient to make out a prima facie case is in the possession of the prosecutor, even though it may not be sufficient to warrant a conviction. (*f*) And the same principle, mutatis mutandis, must evidently prevail in respect to civil suits.

The investigation under its other aspect is much less simple For the solution of the question when that prima facie appearance of liability, civil or criminal, shall be deemed to exist, to the extent of warranting a person in undertaking to invoke the aid of the state, the law has devised no better expedient than the one already referred to in sec. 1, ante. Taking the conduct of the typical discreet citizen as the standard, the courts have evolved a working rule which has been thus formulated in a recent case :

Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man,

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(*d*) *Broad* v. *Ham* (1839) 5 Bing. N.C. 722, per Coltman, J.: *S. P. Turner* v. *Ambler* (1847) 10 Q.B. 252: *Wiseman* v. *McCulloch* (1884) 1 Montr. L.R. (S.C.) 338, per Loranger, J., following Hilliard on Torts, p. 429. See also cases cited in the following section.

(*e*) "Mere suspicion cannot in any case amount to reasonable and probable cause. There must be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant the belief that the party is guilty of the crime of which he is accused:" Harrison, C.J., in *Munroe* v. *Abbott* (1876) 39 U.C.Q.B. 78, citing *Douglas* v. *Corbett*, 6 E. & B. 511; *Dawson* v. *Vansandau*, 11 W.R. 516, and American cases. See also *Riddell* v. *Brown* (1864) 24 U.C.Q.B. 90: *Barrette* v. *Turner* (1886) 9 L.C. Leg. News (S.C.) 314.

(*f*) *Dawson* v. *Vansandau* (1863) 11 W.R. 516.

placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. (*g*)

7. Subsidiary issues suggested by this doctrine—(*a*) *Defendant liable in damages unless he shews that his belief was the operative inducement to the institution of the proceedings*—A party who does not believe in the guilt of the accused cannot be said to have reasonable and probable cause for making the charge. (*a*) Reasonable and probable cause, therefore, must appear not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding; (*b*) and he must fail, under a plea of not guilty, if he does not prove that the facts of the case, or, at all events, so much of the facts as would have been sufficient to induce a belief of the plaintiff's guilt on the mind of any reasonable man, had been communicated to him previous to the laying of the charge. (*c*) Knowledge acquired after the arrest of the plaintiff cannot be proved to support an allegation of reasonable cause. (*d*)

(*g*) *Hicks* v. *Faulkner* (1881) 8 Q.B.D. 167. See also *Johnson* v. *Emerson* (1871) L.R. 6 Exch. 329, per Martin, B. (p. 373); *Munroe* v. *Abbott* (1876) 39 U.C.Q.B. 78, per Harrison, C.J.; *Webber* v. *McLeod* (1888) 16 Ont. R. 609, per Ferguson, J. Formerly a distinction seems to have been taken between "reasonable" and "probable": *Jones* v. *Givin* (1712) Gilbert's K.B. 185 (p. 187).

(*a*) *Broad* v. *Ham* (1839) 5 Bing. N.C. 722; *McVellis* v. *Gartshore* (1853) 2 U.C.C.P. 464 (Sullivan, J., arg.); *Millner* v. *Sanford* (1893) 25 Nov. Sc. 227.

(*b*) *Turner* v. *Ambler* (1847) 10 Q.B. 252. "Reasonable and probable cause in the mind of the judge is not alone sufficient; there must be also reasonable and probable cause moving and inducing the defendant:" *Shrosbery* v. *Osmaston* (C.P.D. 1878) 37 L.T.N.S. 792, per Denman, J.

(*c*) *Doeurc* v. *Hilton*, cited by Tindal, C.J., in *Delegal* v. *Highley* (1837) 3 Bing. N.C. 950.

(*d*) *Shaw* v. *McKenzie* (1881) 6 Can. S.C. 181. But probable cause may be established by evidence confirmatory of that of an accomplice, which, though it was not disclosed until after the plaintiff was given into custody, was discovered before the criminal charge was preferred against him with a view to prosecution: *Dawson* v. *Vansandau* (Q.B. 1863) 11 W.R. 516. Hence, for the purpose of ascertaining whether the defendant believed in the truth of a charge on which he caused the plaintiff to be arrested, it is proper to look at the time of the arrest, and not at the time of the trial: *Wiseman* v. *McCulloch* (1884) 1 Montreal L.R. (S.C.) 338. The principle that the law is concerned only with the mental condition of the defendant at the time when he moved in the case sometimes enures to his benefit. Thus, where the facts are otherwise sufficient to justify the defendant in believing that the property found in the plaintiff's possession was that which had been taken away from him, the absence of probable cause for arresting him is not established by the mere fact that one of the plaintiff's witnesses contradicted at the trial the statements of the witness on whose testimony the defendant had placed his main reliance, for, granting that such contradiction is true, it can have no bearing upon the significance of the defendant's conduct, unless it is shewn that, before instituting the prosecution, he had an opportunity of knowing what such witness would say: *Joiner* v. *Thompson* (1867) 26 U.C. Q.B. 519.

If the jury find that the defendant did not believe the information upon which he based the charge, the judge is right in ruling that he had no reasonable or probable cause for laying the indictment ; (*e*) and a verdict for the plaintiff based on such a finding will not be disturbed. (*f*) On the other hand, it is of course still open to the judge to rule either way, where the defendant is found by the jury to have believed in the sufficiency of the grounds upon which he proceeded. (*g*)

As there can be no more conclusive proof of the defendant's want of belief than the demonstrated fact that he was actually aware of the plaintiff's innocence, the principle that an action lies for instituting or continuing a prosecution after the defendant has obtained knowledge of the plaintiff's innocence is not disputed. (*h*)

(*b*) *Evidence of extraneous motive of defendant, bearing of*— Evidence that the defendant was actuated by some motive other than the desire to vindicate the law has been held in several cases to be competent to disprove the existence of probable cause. (*a*)

But the argument that the attachment of a debt was procured for the purpose of extorting money from the plaintiff is of no force, unless the payment was made to release him from debt that was falsely alleged to be due. (*b*)

(*e*) *Haddrick* v. *Heslop* (1848) 12 Q.B. 267 : *Douglas* v. *Corbett* (1856) 6 El. & Bl. 611. For an instance in which this rule was applied by a trial judge, see *Williams* v. *Banks* (1859) 1 F. & F. 557. The non-appearance of the defendant either at the hearings before two magistrates before whom successively he caused the plaintiff to be brought : *Shufflebottom* v. *Allday* (1857) 5 W.R. 315, or at the trial : *Taylor* v. *Williams* (1831) 2 B. & Ad. 845, is evidence from which want of probable cause may be inferred. On the other hand, evidence which merely shews that the defendant, after the plaintiff had been discharged by one magistrate, had him arrested on the same charge and brought before another magistrate, is not competent on the issue of probable cause. It is, however, admissible in aggravation of damages, as shewing the motive with which the defendant had acted : *Wilton* v. *Elmore* (1830) 4 C. & P. 456, per Tindal, C.J.

(*f*) *Ravenga* v. *Mackintosh* (1824) 2 B. & C. 693.

(*g*) *Shrosbery* v. *Osmaston* (C.P.D. 1878) 37 L.T.N.S. 792, per Denman, J.

(*h*) See *Fitzjohn* v. *McKinder* (1861) 9 C.B.N.S. 505 : *Harrison* v. *National, &c., Bank* (Q.B.D. 1884) 49 J.P. 390 : *Abrath* v. *North-Eastern R. Co.* (1883) 11 Q.B.D. 440, per Bowen, L.J. (p. 462) : *Cox* v. *Wirrall* (1607) Croke Jac. 193

(*a*) *Broad* v. *Ham* (1839) 5 Bing. N.C. 722 [charge accompanied by a demand for a sum of money] : *Ravenga* v. *Mackintosh* (1824) 2 B. & C. 693 ; 1 C. & P. 204 [evidence was that plaintiff was arrested as a means of enforcing a contract] : *Haddrick* v. *Heslop* (1848) 12 Q.B. 267, affirmed in Exch. Ch. sub nom. *Heslop* v. *Chapman* (1853) 23 L.J.Q.B. 49 [evidence was that plaintiff was prosecuted for perjury to get rid of his evidence on a new trial of the case in which the perjury was alleged to have been committed : *Lefuntun* v. *Bolduc* (1878) 1 L.C. Leg. News (S.C.) 266 [same point].

(*b*) *Purton* v. *Hill* (1864) 12 W.R. 753, per Mellor, J.

(*c*) *Existence of bona fide belief in truth of charge, a conclusive justification*—That the existence of a bona fide belief on the defendant's part that the plaintiff was amenable to the proceedings complained of negatives conclusively the absence of probable cause as not disputed, and in fact is necessarily implied in the general principle stated in sec. 4, supra (*a*) If the trial judge leaves the question of the defendant's liability as a whole to the jury, it is proper for him to direct them to find a verdict for the defendant, if they think he believed the matters sworn to in his information ;(*b*) while, if he asks for a special finding as to the existence of a bona fide belief on the defendant's part, he should enter judgment for the defendant if the jury finds that there was such a belief. (*c*)

(*d*)—*provided such belief is based on reasonable grounds*—The rule stated in the last sub-section is subject to the qualification necessarily implied in the fact that the standard which the law constantly keeps in view is the course of conduct which, under the circumstances, would presumably have been pursued by a "discreet man." (*a*) In other words, the defendant's suspicion that the offence charged had been committed by the plaintiff is not enough to justify the laying of the charge ; there must be reasonable grounds for his suspicion. (*b*)

(*a*) In an action for malicious prosecution of the plaintiff on a charge of perjury, a charge is not open to exception which declares that, although the jury may believe that a certain event, [here the delivery of a key to the defendant,] had really occurred in the manner stated by the plaintiff, yet, if they also believed that the defendant, in instituting the prosecution, had acted under the honest impression that the event had not so happened, and that the plaintiff had sworn falsely and corruptly, no jury would be justified in saying that there was a want of reasonable and probable cause : *Hicks* v. *Faulkner* (1881) 8 Q.B.D. 167, affirmed by Ct. of App. without any lengthy arguments (1882) 46 L.T.N.S. 127. See also *Rice* v. *Saunders* (1876) 26 U.C.C.P. 27, per Galt, J.: *Reid* v. *Maybee* (1880) 31 U.C. C.P. 384.

(*b*) *Winfield* v. *Kean* (1882) 1 Ont. R. 193.

(*c*) *Loog* v. *Nahmaschinen, &c., Gesellschafft* (1884) 4 Times L.R. 268, per Stephen, J., at nisi prius.

(*a*) See secs. 1, 4, ante. The supposed "discreet" man, in these cases, is assumed to be one without legal training : *Kelly* v. *Midland, &c., R. Co.* (1873) Ir. Rep. 7 C.L. 8.

(*b*) *Broughton* v. *Jackson* (1852) 18 Q.B. 378 : *Douglas* v. *Corbett* (1856) 6 El. & Bl. 511 : *Young* v. *Nichol* (1885) 9 Ont. R. 347, per Cameron, C.J.: *Patterson* v *Scott* (1876) 38 U.C.Q.B. 642 : *Webber* v. *McLeod* (1888) 16 Ont. R. 609: *Gunn* v. *McDonald* (1850) 6 U.C.Q.B. 596 : *Laidlaw* v. *Burns* (1866) 16 L C.R. (Q.Q.B) 318 : *Lajeunesse* v. *O'Brien* (1874) 5 Revue Legale (S.C.) 242. The knowledge of the defendant that the plaintiff had denied his guilt on oath is evidence from which a jury may infer the defendant's want of belief : *Millner* v. *Sanford* (1893) 25 Nov. Sc. 227.

A finding that there was reasonable and probable cause for prosecuting a physician on a charge of conspiring to defraud a railway company by misrepresenting the nature of the injuries received by a passenger who had sued for damages is amply sustained where the directors had before them statements of certain persons which, if they were true, clearly shewed a conspiracy, and also the evidence of doctors of the highest skill that the case of the passenger was a sham, and that the wounds upon him were produced by improper means. (*c*)

On the one hand, therefore, a judge is not bound to say that there was reasonable cause, merely for the reason that the defendant believed there was reasonable cause. (*d*) On the other hand, it is error for him to rule that there was probable cause where the jury have found that the defendant had no reasonable ground for his belief. (*e*)

(*e*) *Duty of the moving party to obtain accurate information before he takes action*—In determining whether there was probable cause, it is always a material question whether the defendant took proper pains to ascertain the true state of the case. (*a*) An omission to verify information is always competent, though not conclusive, evidence of a want of probable cause. (*b*)

The question whether the defendant discharged his obligation to make due inquiries is resolved in one of its aspects by an

(*c*) *Abrath* v. *North-Eastern R. Co.* (C.A. 1883) 11 Q.B.D. 440: 11 A.C. 247. In *Gowan* v. *Holland* (1896) 11 Que. Off. R. (S.C.) 75 it was laid down that, to establish the existence of probable cause, the evidence relied upon must be such that, if it had been true, it would have supported the criminal charge. But the above cases shew that this enunciates a doctrine much more favourable to the plaintiff than is warrantable. In one Irish case, it was laid down that, if the defendant honestly believes that his charge was well founded, the mere fact that his belief was not reasonable will not render him liable on the ground of a want of probable cause: *Lowe* v. *Collum* (1877) 2 L.R. Ir. 15. But this ruling, which at first sight seems to be in conflict with the general current of authority, loses most of its significance when we find that it was made in an action for malicious prosecution on a charge of sending a threatening letter, and that the specific point determined was that it was error to direct a verdict for the plaintiff where one of the findings was that the belief of the defendant that the letter was in the plaintiff's handwriting was not honest *and* reasonable.

(*d*) *Shrosbery* v. *Osmaston* (Q.B.D. 1878) 37 L.T.N.S. 792, per Denman, J. Compare the remark of Lindley, J., in the same case, that if the defendant is found to have believed in the existence of probable cause, the question remains: Did he believe it rashly and hastily, or were there reasonable grounds.

(*e*) *McGill* v. *Walton* (1888) 15 Ont. R. 389.

(*a*) *Abrath* v. *North-Eastern R. Co.* (C.A. 1883) 11 Q.B.D. 440 (p. 450): *Quartz Hill, &c., Co.* v. *Eyre* (1884) 11 Q.B.D. 674: *Harrison* v. *National, &c., Bank* (Q.B.D. 1884) 49 J.P. 390: *Shaw* v. *McKenzie* (1881) 6 Can. S.C. 181.

(*b*) *Lister* v. *Perryman* (1870) L.R. 4 H.L. 521: *McGill* v. *Walton* (1888) 15 Ont. R. 389.

appropriate application of the general principle that "it is not necessary that the utmost investigation that can be made should be made, but merely that a reasonable amount of credible information should have been received." (*c*) Supposing the evidence upon this point to be in favour of the defendant, it remains to be settled whether his belief in the correctness of the information received was warrantable or not. (*d*) This depends partly upon the inherent probability or improbability of the facts communicated, whether such probability or improbability be considered with reference to some absolute standard or to the character and social position of the person proceeded against. (*e*) But most of the cases turn upon the question whether the defendant was justified, under the circumstances, in entertaining a favourable opinion of the trustworthiness of his informant.

"I apprehend that you are to have regard to every shade of difference between the amount of credit to be given to one person and to another, according to the character of the informant. Information given by one person of whom the party knows nothing, would be regarded very differently from information given by one whom he knows to be a sensible and trustworthy person. And the question whether a reasonable man would act upon the information must depend, in a great degree, upon the opinion to be formed of the position and circumstances of the informant, and of the amount of credit which may be due under those circumstances to the person who thus conveyed the information." (*f*)

The scope of the general principle that reasonable and probable cause is established where the defendant acted in good faith upon statements made to him by persons apparently respectable and believed by him to be credible (*g*) was examined by the House of Lords in the important case of *Lister* v. *Perryman*. (*h*)

(*c*) *Lister* v. *Perryman* (1870) L.R. 4 H.L. 521.

(*d*) *Vogg* v. *Kemp* (1887) 4 Times L.R. 32 [probable cause always a proper inference from evidence that defendant was reasonably careful in making inquiries].

(*e*) An employer has been held liable in damages where, acting on the uncorroborated accusations contained in an anonymous letter, caused his foreman, a man who had always borne a good character for honesty, to be arrested for theft: *Parker* v. *Langridge* (1892) Queb. Off. R. 1 Q.B. 45. The "unblemished character" of the plaintiff was one of the facts relied on in *Colbert* v. *Hicks* (1880) 5 Ont. App. 571 [arrest for debt].

(*f*) Lord Hatherley in *Lister* v. *Perryman* (1870) L.R. 4 H.L. 521 (p. 531).

(*g*) *Chatfield* v. *Comerford* (1865) 4 F. & F. 1008, per Cockburn, C.J. See also *Baker* v. *Jones* (1865) 19 U.C.C.P. 365.

(*h*) (1870) L.R. 4 H.L. 521, rev'g L.R. 3 Exch. 197.

There it was held that A., although he is not justified in making an arrest on a charge of stealing a gun, where he has merely been informed by B., a trusted servant, that B. has heard from C. that D., the party arrested, had the gun in his possession, but has reasonable cause for making such arrest without further inquiry, where B. declared that he went with C. and D. to the place where C. asserted he had seen the gun, and that C. there repeated and adhered to his accusation in the presence of D., and declared that the gun which was then shown was not the one which he had seen on the previous occasion. The House of Lords expressed its disapproval of a direction of the trial judge, which required the jury to render a verdict for the plaintiff if they believed from the evidence that A. had arrested D. without seeing and questioning C. as to the truth of the statements made by B., and adopted the view of Bramwell, B., in the Court of Exchequer, that, while such a course would have been a reasonable and proper one, it did not follow that the omission to make the investigation suggested was not reasonable. Lord Hatherley laid it down that such an omission was an element proper for consideration, but "not an element of such importance that it should deprive the defendant of the justification of saying that, after the inquiries he had made into the case, and the unusual opportunities he had had of satisfying himself of the trustworthiness of his original informant, he was, in the eye of the law, a person having reasonable and probable cause to order the arrest." Lord Chelmsford said: "The question was not whether the defendant might not have obtained more satisfactory and surer grounds of belief by applying to C. for further information, but whether the facts brought to his knowledge furnished reasonable and probable cause for his believing that the plaintiff had dishonestly possessed himself of his rifle, and justified him in acting on that belief without further inquiry." . . . . . "The question really comes to this: Whether in an action for malicious prosecution, where a person is proved to have acted upon the information of a trustworthy informant, he can be said to have proceeded without reasonable and probable cause because he has not made inquiry of someone else who could have repeated and confirmed what was told him. It was an incorrect mode of putting the case by the Chief Baron to say that the defendant charged the plaintiff with felony 'on the mere hearsay statement of his coachman.' If the defendant had acted immediately upon the communication of what Hinton had heard from Robertson without any inquiry, I should have agreed with him that it was not the course which a reasonable and discreet man would have adopted, and that he would have deprived himself of all ground of defence to the action. But I cannot think, with the Chief Baron, that what passed between Hinton and Robinson carried the case no further, and that it was still a matter of hearsay, and a repetition of what Robinson was supposed to have said, as to the identity of the gun.' The introduction of the plaintiff makes all the difference in the case. The communication

which Hinton was able to make, and which he did make, to the defendant was no longer what he had been told by Robinson, but what had passed by the plaintiff in his own presence."

This decision involved the reversal of the judgment in the Exchequer Chamber, which had upheld the view of the majority of the judges of the lower court, who had adopted the theory that "you can never proceed on hearsay evidence, when you have a good opportunity of testing the accuracy of the hearsay evidence by examining the person who is represented to have said such and said things."

Some of the authorities are, however, much more favourable to the defendant than the rationale of this case would seem to indicate.

Thus there is an old ruling to the effect that where a father preferred an indictment of rape against the plaintiff on the complaint of his daughter, a girl of eight years of age, it was held that the action could not be maintained, although the court was of opinion that the father was too credulous in causing an indictment to be preferred on the complaint of so young a girl. (*i*) So evidence of an accomplice or tainted witness, even if uncorroborated, and therefore not sufficient to sustain a conviction, is held to warrant the preferring of a criminal charge. (*j*) So a defendant shows probable cause for instituting a prosecution for arson where he acted bona fide upon statements made by convicts during the term of their imprisonment, even though they were not sworn, and were not legally competent, without a pardon, to be received as witnesses. (*k*)

The duty to verify information is very properly regarded as imperative where the information is received through an anonymous letter. (*l*)

In an action for presenting a petition to wind up a company, the question whether the defendant who had signed a transfer of shares, and handed it to his brokers, and had not received back the power in ten or eleven days, is entitled, in the ordinary course of business, to assume without further inquiry that the transfer had not been effectual, even though the brokers had told him that they could not dispose of the shares, is a question raising an issue of fact for the jury, and unless he is found not to be so entitled, the judge ought to hold that there was no reasonable cause for the defendant to suppose that he was still a share

(*i*) *Cox* v. *Wirrall*, Cro. Jac. 193.

(*j*) *Dawson* v. *Vansandau* (1863) 11 W.R. 310.

(*k*) *Oswald* v. *Mewburn* (1843) 6 U.C.Q.B. (O.S.) 471.

(*l*) *Ruttan* v. *Pringle* (1851) 1 U.C.C.P. 244; *Parker* v. *Langridge* (1892) 1 Que. Off. R. (Q.B.) 45; *Coyle* v. *Richardson* (1879) 2 L.C. Leg. News (S.C.) 60.

holder at the expiration of the period. (*m*) The same case decides two other points: (1) The mere fact that a company was defrauded by promoters into paying an excessive price for its property, and was about to take proceedings to recover back part of that price, does not furnish any reasonable and probable cause to a shareholder for filing a petition to wind up the company. (2) The fact that articles have been published in the newspapers casting odium on a company does not furnish reasonable or probable cause for presenting a petition to wind up a company. The opposite doctrine, it was said, would involve the proposition that a person, without taking the trouble to inquire whether the allegations might not be subject to the errors frequently occurring in newspaper reports, is at liberty to take a step which may destroy the credit of the company.

Where the circumstances upon which action is to be taken are susceptible of two constructions, one of which will render an arrest unjustifiable, it is the duty of the moving party to make further inquiry so as to ascertain the real significance of those circumstances, (*n*)

So far as regards the right of a prosecutor to rely upon his own recollection of material circumstances without substantiating it by further inquiries, the only rule which it seems possible to enunciate is the very indefinite one that such reliance is not necessarily unjustifiable.

"It does not follow," said Hawkins, J., in a recent case, (*o*) "that, because the supposed fact had no real existence, the belief of the accuser that it had such existence was unreasonable. . . . If a man has never seen reason to doubt, but, on the contrary, has even had reason to trust, the general accuracy of his memory, and that memory presents to him a vivid apparent recollection that a particular occurrence took place in his presence within a recent period of time, is it not reasonable to believe in the existence of it? the more especially if his diary and other surrounding circumstances appear to confirm his memory. What more

(*m*) Brett, M. R., in *Quartz Hill, &c., Co.* v. *Eyre* (1883) 11 Q.B.D. (C.A.) 674 (p. 686). Bowen, L.J., merely said that his view as to reasonable and probable cause might be influenced by the jury's opinion. In the Court of Queen's Bench, after the new trial ordered by the Court of Appeal, the judges held that the defendant was not justified, as a matter of law, in proceeding without ascertaining whether the power so granted had been exercised (50 L.T.N.S. 274).

(*n*) A creditor has no right to submit an affidavit that a debtor has made a conveyance of his property to prevent its being taken in execution simply because he was apparently in possession of considerable property, and the sheriff had returned "nulla bona." Non constat, that the return may not have been false, or the property not really his: *Smith* v. *Chef* (1842) 6 U.C.Q.B. (O.S.) 213.

(*o*) *Hicks* v. *Faulkner* (1881) 8 Q.B.D. 167. See also *Young* v. *Nichol* (1885) 9 Ont. R. 347.

reasonable ground can be suggested for a belief that any particular act was done than the conviction of the person believing that he remembers it as having been done in his presence before his own eyes." . . . . . A person who acts upon the information of another trusts the veracity, the memory and the accuracy of that other, in each of which he may be completely deceived. His informant's veracity may be questionable, his memory fallacious and his accuracy unreliable. Yet it does not follow that it was unreasonable to believe in his information if he never had cause to doubt him. In like manner a man may be deceived by his own memory, yet it does not follow that it was unreasonable to trust it, if he never knew it to be defective" (*p*).

(*f*) *Defendant's knowledge of exculpatory circumstances*—The weight of authority supports the view that, even if a party has a prima facie case, he cannot be said, as to have reasonable and probable cause for instituting proceedings, where he knows of facts which constitute a perfect defence.

Thus, where the plaintiff had been inducted (under 7 & 8 Geo. 4, c. 30), for unlawfully obstructing the air-way of a mine, it was held to be error to direct a verdict for the defendant, where evidence was given upon the trial that, before the obstruction was put in place, the defendant had been informed by the plaintiff that the latter, in setting up the obstruction, had done so by order of his employer in the assertion of a bona fide claim of right. (*a*) So, in an action for maliciously procuring the plaintiff to be indicted for an assault, reasonable and probable cause is not established in such a sense as to justify a nonsuit, where the plaintiff's testimony is to the effect that the purpose of the assault was to remove the defendant from his premises, after he had refused to leave them. (*b*)

On the other hand, it has been laid down, though not in very positive terms, that the undisputed commission of an act of disobedience by a naval officer furnishes his superior with reasonable and probable cause for

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(*p*) In *Wilkinson* v. *Foote* (1856) 5 W. R. 22, the fact that the prosecutor himself had actually given to the plaintiff the article which the latter was charged with stealing was assumed not to be incompatible with the existence of probable cause.

(*a*) *James* v. *Phelps* (1840) 11 Ad. & D. 483; 3 Perry & D. 231. To the same effect, see *Fellowes* v. *Hutchison* (1855) 12 Upp. Can. Q.B. 633 [accusation of felony where defendant took possession of property under a claim of right].

(*b*) *Hinton* v. *Heather* (1843) 14 M. & W. 131. This case and *Fellowes* v. *Hutchinson*, supra, were followed in *Routhier* v. *McLaurin* (1889) 18 Ont. R. 112, where, in a similar action, it was held to be error to tell the jury that, if they found an assault to have been committed, that would end the case, as there was reasonable and probable cause for the prosecution. The plaintiff was entitled to have the circumstances relied upon as justification for the assault submitted to the jury; and also to have their finding as to the defendant's consciousness when he laid the information that he had been in the wrong.

bringing him to court-martial, although such superior was cognizant of circumstances which justified such disobedience. (*e*)

Obviously, however, it is wholly impossible to reconcile this latter theory with the doctrine that the reasonable belief of the moving party in the criminal or civil liability of the party proceeded against is the touchstone by which the existence of probable cause must be tested. If the former knows, or is affected with constructive notice, of the fact that the latter has a perfect defence which will prevent the enforcement of liability to which he might otherwise be subject, it is impossible to assert with any show of reason that it is justifiable to drag him into court, so as to go through the idle formality of exculpating himself. The separation of the facts which prima facie constitute an offence or furnish a good cause of action from the facts which render it impossible to convict or recover damages is a mere scholastic subtlety which is quite out of place in this connection.

(*g*) *Rule where the issue presented is whether the acts charged as done amount in law to the crime charged*—There is a clear distinction between the defendant's belief that the acts upon which he based his charge were done by the plaintiff and his belief that those acts really constituted the specific crime for which he seeks to have the plaintiff tried. In the former case his belief may or may not be warrantable, as we have already seen. In the latter case his liability is determined by the principle, Ignorantia juris neminem excusat. The rule is well settled, therefore, that a want of probable cause is conclusively established by proof that the plaintiff, however culpable in other respects he may have been, had done nothing which would render him legally amenable to the process employed against him by the defendant (*a*)

(*e*) *Johnstone* v. *Sutton* (1786) 1 T.R. 493. "I doubt," said Eyre, B. (p. 507), in delivering the opinion of the Court of Exchequer, "whether, if a man were to indict one for murder, who had committed homicide under circumstances within the knowledge of the prosecutor which made it justifiable, it could be said that there was no probable cause for preferring that indictment. In the Court of Exchequer Chamber, Lords Mansfield and Loughborough agreed with the lower court on this particular point, though the judgment was overruled as a whole. That the moving party is not bound to investigate the truth of any excuse which the guilty party may offer was also laid down in *Wiseman* v. *McCulloch* (1884) 1 Montr. L.R. (S.C.) 338, but there the excuse actually offered was a falsehood.

(*a*) *Farmer* v. *Darling* (1776) Scarr. 1971; *Heath* v. *Heap* (1856) 5 W.R. 23; *Michell* v. *Williams* (1843) 11 M. & W. 205; *Abell* v. *Light* (1868) 1 Hannay, N.B. 240; *Huntley* v. *Simson* (1857) 2 H. & N. 600; *Bonier* v. *Holder* (Q.B.D. 1886) 51 J.P. 277; *Searp* v. *Saxton* (1896) 28 Nov. Sc. 278. In an action for false arrest on a charge of "unlawful malicious injury to the defendant's property" (R.S.C., ch. 168, sec. 50), by sawing off the ends of some old and rotten logs used in the construction of a building which the plaintiff was allowed to occupy, the fact that logs were actually cut does not constitute a valid defence, if it is shewn that they were of no appreciable value. A finding of the jury that the

But the application of the maxim is subject to some reasonable exceptions, as where the justifiability of the proceedings depends upon the construction of an obscure statute.

"In a matter of some difficulty connected with a new Act of Parliament, and on which opinions might differ, a mistake might be made without any blame attaching, and a person under the influence of such a mistake might still have reasonable and probable cause for taking a proceeding which it turned out afterwards was not justified." (*b*)

For analogous reasons, where an attorney in the petition upon which a debtor of his client is adjudicated a bankrupt truly states all the facts upon which the proceedings are taken, absence of reasonable and probable cause cannot be inferred from the circumstance that he was mistaken in point of law as regards the statements made. (*c*)

In the nature of the case, a want of probable cause cannot be predicated where the facts alleged are such that, if they are true, the plaintiff's amenability to the proceedings is legally beyond dispute. (*d*)

In one instance, an attempt was made upon a special ground to restrict the effect of this proposition. The doctrine which the plaintiff sought to establish in *Lowes* v. *Telford* (*e*) was that the fact of the defendant's possessing certain rights for civil purposes did not necessarily avail him as a defence to an action to recover damages for a prosecution

defendant had not reasonable ground for believing that the plaintiff had unlawfully and maliciously injured his property includes, by implication, a finding that there was a want of such value, and, consequently, an absence of such circumstances as are necessary to constitute reasonable and probable cause for the prosecution: *Webber* v. *McLeod* (1888) 16 Ont. R. 609. If the act of the plaintiff was one for which an officer had no right to make an arrest at all, the mere fact that he may have, bona fide, believed that he had a right to make the arrest, and that such was his official duty is no qualification: *Kelly* v. *Burton* (1895) 26 Ont. Rep. 608, aff'd 22 Ont. App. 522. It may also be noted that, if the defendant, at the time he made the affidavit upon which the plaintiff was arrested, had reason to believe that the demand was not one on which a capias could lawfully issue, he is, as matter of law, guilty of malice: *Gibbons* v. *Alison* (1846) 3 C.B. 181, per Tindal, C.J., and Maule, J. (p. 185).

(*b*) *Johnson* v. *Emerson* (1871) L.R. 6 Exch. 329, per Cleasby, B. (p. 351); *Phillips* v. *Naylor* (1859) 4 H. & N. 565, per Erle, J. (p. 568).

(*c*) *Johnson* v. *Emerson* (1871) L.R. 6 Exch. 329, per Bramwell, B. (p. 365).

(*d*) As where the non-liability of defendant must at once be conceded on proof that the plaintiff was indebted to him: *Drummond* v. *Pigou* (1835) 2 Scott 228 (outlawry for non-payment of debt admitted to be due); *David* v. *Thomas* (1837) 1 L.C. Jur. (Q.B.) 69 (use of *suisie gagerie* to enforce payment of rent disputably due). Probable cause for prosecuting the plaintiff on a charge of assault is shewn where he admits that he struck the defendant: *Raymond* v. *Rider* (1892) 24 Nov. Scot. 363.

(*e*) (H.L., 1870) L.R. 1 A.C. 414.

of the plaintiff which would admittedly have been unjustifiable if the defendant did not really possess those rights. But the House of Lords declined to accept this theory, and laid it down that, as a mortgagee has by the legal title to, and is able to take possession of, the mortgaged premises at any time, persons taking possession by his authority are regarded as being rightfully in possession. Hence, even though they have taken possession in a rough and discourteous manner, and by taking advantage of the mortgagor's absence, another person who enters and forcibly ejects them by the authority of the mortgagor is guilty of the offence of forcible entry, and, if indicted on such a charge, cannot maintain an action against the prosecution on the theory that he acted without reasonable and probable cause. Lord Selborne thus disposed of the special point made by counsel: "The question whether there was any reasonable ground for that charge or not must necessarily depend upon the state of the legal possession of the *locus in quo* at the time when the acts alleged to constitute the forcible entry were done; and if for civil purposes the legal possession was in the appellant, the foundation for such an action, so far as the state of possession is concerned, is sufficiently and properly established.

8. Illustrative decisions as to the justifiability of various proceedings—The justifiability of instituting particular proceedings under special circumstances will be further illustrated by the subjoined rulings:

(*a*) *Clandestine removal of goods*—Evidence that the plaintiff had actually removed the goods to his own house, locked them up, and refused to surrender them on demand, shows probable cause for laying a complaint on this ground. (*a*)

(*b*) *Conspiracy to defraud*—The fact that the dishonest character of the plaintiff's son was concealed from the defendant, with whom he was about to engage in business transactions which involved the son's having the custody of valuable property belonging to the defendant, does not justify the latter, after the son has absconded largely indebted to him, in prosecuting the father for a conspiracy to defraud. (*b*)

Reasonable and probable cause for A.'s laying an information against B. for becoming a party to a conspiracy by which C. was seeking to defraud a company, of which he was manager and to which he was largely indebted, is established where the evidence is that C. transferred his entire estate to B., the foreman of the company, earning $2.50 a day, for a consideration which was stated as $7,000 cash, but of which no part was satisfactorily shown to have passed; that on the next day B. transferred the same property to the wife of C. in consideration partly of a promise to

(*a*) *McNellis* v. *Gartshore* (1853) 2 U.C.C.P. 464.

(*b*) *Rowlands* v. *Samuel* (1847) 17 L.J.Q.B. 65.

board B. as long as she rented a house, and partly of a sum of money, of the disposition of which no account could be given; that the deeds of transfer were subsequently registered by B. on hearing that C. had been dismissed from his position; and that B. had for years boarded with C. and his wife free of cost, and was on terms of close intimacy with them. (*c*)

(*c*) *Embezzlement*—There is probable cause for a charge of embezzlement where the employee refuses to account for a missing sum of money which has been in his hands, (*d*) and where he has written the person to whom the money was to be handed, denying that he has received it, is sufficient to shew probable cause for a prosecution on a charge of misappropriation; (*e*) but not where the servant, a commercial traveller, has merely used for his own purposes a portion of the money received from the customers where he believes that he is entitled to do so and it is not certain which party is really indebted to the other, (*f*) nor where, at the time of the arrest, about two-thirds of the money entrusted to the employee to make purchases had been accounted for and the terms of the agreement are uncertain. (*g*)

(*d*) *Forgery*—Probable cause for a prosecution on this charge exists where the cashier of the bank where a forged check was cashed has identified the plaintiff as the person who cashed it; (*h*) but not where the only evidence to throw suspicion on the plaintiff is similarity of handwriting. (*i*) Nor is any probable cause established for prosecuting a young man of twenty years of age on a charge of having forged his father's name to a note where the proceedings were based merely upon evidence given by the son at the trial of a suit on the note, to the effect that he never intended to sign any such instrument, and that, if he actually did sign it, he did so in the belief that it was only a receipt for goods delivered by express, and upon the answer received by the prosecutor to an enquiry made from the agent of the express company, who informed him that there was a receipt, but that the signing was denied by the son, and the signature could not be sworn to. (*j*)

(*c*) *Isler* v. *Ross* (1894) Que. Off. R. 6 S.C. 312; aff'd by Q.B.

(*d*) *Patterson* v. *Scott* (1876) 38 U.C.Q.B. 642.

(*e*) *Kagar* v. *Dyett* (1831) 4 C. & P. 4 [nonsuit of plaintiff].

(*f*) *Mewell* v. *Lesser* (1879) 2 L.C. Leg. News 18 S.C. 108, per Johnson, J.

(*g*) *Lavergne* v. *Willett* (1874) 23 L.C. Jur. (Q.B.) 184. For a case in which the same court was divided on the question whether there was probable cause for an arrest on a charge of having converted to the plaintiff's own use goods bought by him with money furnished by the defendant, see *Copeland* v. *Forbes* (1886) 2 Mont. L.R. (Q.B.) 365.

(*h*) *Harrison* v. *National, &c., Bank* (Q.B.D. 1884) 49 J.P. 390.

(*i*) *Clements* v. *Wheley* (1847) 2 C. & K. 685.

(*j*) *Chamberlain* v. *Sawyer* (1897) 27 Can. S.C. 450.

(*e*) *License laws, infractions of*—Probable cause for laying an information for a violation of a Liquor License Act exists where the defendant acted on reports of detectives employed to gather evidence for an organization formed to enforce the law. (*k*) So there is probable cause for a constable's arrest of the plaintiff on a charge of infringing a by-law requiring the payment of a license by transient traders, where, at the time of the arrest, he was writing down in his book orders from a tradesman on the house which he represented. (*l*) In an action for maliciously procuring the indictment of the plaintiff for "using the faculty of a badger of corn" without a license, the existence of probable cause is not shewn by the mere fact that the plaintiff acknowledged in his declaration that he did use the faculty. (*m*)

(*f*) *Obtaining money under false pretences*—There is probable cause for prosecuting a person for obtaining money under false pretences where he obtains a loan by false representations that the money was required to meet a note of the firm of which he was one, and that his partner was out of town, (*n*) or by a declaration that there is only one encumbrance on his property, there being really another, though the omission to mention the second mortgage was due to a mistake merely. (*o*)

(*g*) *Poisoning*—Probable cause for this charge is established where plaintiff was a woman working as defendant's cook, and he and his family, after eating a piece of meat cooked by her, exhibited symptoms of poisoning. (*p*)

(*h*) *Theft*—A person cannot justify accusing another of theft merely because the latter has possession of property which the latter believes to be his. (*q*) To warrant such a step, there must be other circumstances calculated to excite a reasonable suspicion that the accused is guilty of the crime. Illustrations of various additional facts which justify a prosecution are given below. (*r*) See also sec. 11, subsec. (*d*), note (*f*), and sub sec. (*e*), note (*f*).

(*k*) *Anderson* v. *Bell* (1892) 24 Nov. Sc. 100.

(*l*) *Quebec* v. *Piche* (1884) 11 Que. L.R. (Q.B.) 249.

(*m*) *Jones* v. *Givin* (1712) Gilbert's K.B. 185 (p. 198).

(*n*) *Choran* v. *McCrory* (1887) 3 Mont. L.R. (S.C.) 404.

(*o*) *Goutle* v. *Saunders* (1880) 3 Montr. L.R. (Q.B.) 208.

(*p*) *Tuley* v. *Corrie* (1867) 10 Cox C.C. 584 (per Cockburn, C.J.)

(*q*) *Colbert* v. *Hicks* (1880) 5 Ont. App. 571.

(*r*) *Chambers* v. *Taylor* (1598) Cro. Eliz. 900 [refusal to account for the possession: *Kelsquin* v. *Workman* (1879) 1 L.C. Leg. News (S.C.) 208 [falsely accounting for possession of goods and offering to sell them at a loss]: *Douglas* v. *Corbett* (1856) 6 El. & Bl. 611 [possession accounted for by a statement seemingly false]: *Wyatt* v. *White* (1860) 5 H. & N. 371 [selling new sacks to be converted into paper]: *Hailes* v. *Marks* (1861) 7 H. & N. 56 [opportunity

There is no reasonable and probable cause for prosecuting on a charge of theft a person who had purchased a horse at an open sale from a servant with whom the prosecutor had, upon his removal to another place, left the horse with a view to his selling it. (*s*) Nor where the plaintiff, a carter, had received the property in question, a small piece of tarpaulin, from an agent of the defendant, a whole year previously, and had since then repeatedly used it as a cover for his cart, without any concealment, while carrying goods to and from the defendant's station. (*t*) Nor are the facts that plaintiff showed a knowledge of the projected movement of an absconding thief, and that he was seen, early in the morning after the robbery, coming from a public entry leading to the back door of the plaintiff's house, sufficient to warrant an arrest. (*u*)

(*i*) *Publication of false accounts by officer of company* (*24 & 25 Vict., ch. 96, sec. 847*)—The mere fact that a report and balance sheet prepared and published by the secretary of a public company contains errors and misstatements, does not afford "reasonable and probable cause" for prosecuting him under this statute. (*v*)

(*j*) *Arrest on mesne process in actions of debt* [*under the old law*]—Arrest for a larger sum than was due was held to show ipso facto want of probable cause. (*w*)

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of stealing]: *Broad* v. *Ham* (1839) 5 Bing. N.C. 722 [plaintiff was an apprentice who had absconded]: *Wilkinson* v. *Foote* (1856) 5 W.R. 22 [plaintiff was an employee who had no opportunity in the normal course of his employment to acquire a knowledge of the condition of certain goods in a warehouse, and pointed out that some of them have been stolen]: *Joint* v. *Thompson* (1867) 26 U.C.Q.B. 519 [new-made path found leading from place where missing timber had been piled to where it was found on plaintiff's premises]: *Rice* v. *Saunders* (1876) 26 U.C.C.P. 27 [re-arrest after discharge upon discovery of reasons pointing to the conclusion that the testimony which induced the magistrate to discharge the plaintiff had been given to screen him]: *Lucy* v. *Smith* (1852) 8 U.C.Q.B. 518 [issue of search-warrant justifiable, where a canary believed by the defendant to be his was seen on plaintiff's premises, and the latter, while admitting it not to be his property, refused to give it up]: *Pinsonnault* v. *Sebastien* (1887) 31 L.C. Jurn (Q.B.) 167 [information repeatedly received that plaintiff had been stealing various articles from him]: *Lefebvre* v. *Beauharnois, &c., Co.* (1879) 2 L.C. Leg. News (S.C.) 269. [Plaintiff went about bragging that he knows the thief, that he has got rich, and that he is in search of the thief, the last statement being wholly false.]

(*s*) *Stewart* v. *Beaumont* (1866) 4 F. & F. 1034.

(*t*) *Stevens* v. *Midland. &c., R. Co.* (1854) 10 Exch. 352.

(*u*) *Busst* v. *Gibbons* (1861) 30 L.J. Exch. 75.

(*v*) *Ayres* v. *Elborough* (1870) 22 L.T.N.S. 106, per Blackburn, J.

(*w*) *Gilding* v. *Eyre* (1861) 10 C.B.N.S. 592: *Savil* v. *Roberts* (1800) 1 Ld. Raymond 374; 1 Salk. 13: *Wetherden* v. *Embden* (1808) 1 Camp. 295: *Goslin* v. *Wilcock* (1766) 2 Wilson 302.

The estimate of a surveyor was taken as prima facie evidence of the value of work and materials in *Silversides* v. *Bowley* (1817) 1 Moore 92. There is a want of reasonable and probable cause for arresting a debtor for an amount greater than that which he owes, if a set-off is deducted: *Mitchell* v. *Jenkins*

(*k*) *Arrest of debtor on ground that he is about to leave the country*—To establish probable cause something further is required than mere proof of the existence of the debt and the impending departure of the debtor. (*x*)

(1833) 5 B. & Ad. 588. The duty of an arbitrator being to render judgment *secundum æquum et bonum*, without being tied down by the strict rules of law, his award in favour of a defendant in an action of debt after examination of the accounts between him and the plaintiff, who had procured his arrest, does not necessarily show that there was nothing legally due, and, therefore, no probable cause for his arrest: *Habershon* v. *Troby* (1799) Peake 135; 3 Esp. 33. An arrest in an action against the acceptor of a bill was held not to be without probable cause where his name and address were identical with those on the bill, even though it turned out that the acceptance was not his in fact, and that he disclaimed the bill when it was presented to him by one of the defendant's clerks: *Spencer* v. *Jacob* (1828) Moo. & M. 180 [where there was no proof that the disclaimer had been actually communicated to the defendant]. As to the construction of the Act of 43 Geo. III., ch. 46, sec. 3, providing that defendant, who had been arrested in an action of debt, should be allowed his costs, if the plaintiff "recovered" less than the amount for which the arrest was made, and the arrest was "without reasonable and probable cause," see *Keene* v. *Deeble* (1824) 3 B. & C. 491, and cases cited [money awarded by arbitration not "recovered"]: *Thompson* v. *Atkinson* (1827) 6 B. & C. 193 [statute does not cover cases where all matters in difference between the parties and the costs are to abide the event of the award]: *Silversides* v. *Bowley* (1817) 1 Moore 92 [defendant not entitled to costs, unless arrest was malicious and vexatious].

(*x*) *Shaw* v. *McKenzie* (1881) 6 Can. S.C. 181: *Henderson* v. *Duggan* (1879) 5 Que. L.R. (S.C.) 364: *Berry* v. *Dixon* (1854) 4 L.C.R. 218. Under the Nova Scotia Act for abolishing arrest for debt on mesne process (Rev. Stat. Nov. Scot., ch. 94), the fact that the holder of a note had good cause for believing, and did believe, that the maker was about to leave the province, and that they would lose their remedy against him if he was not forthwith arrested, constitutes reasonable and probable cause for the arrest, notwithstanding they might have believed that they could recover the amount of the debt from the indorsers: *Bank of British N.A.* v. *Strong* (1876) L.R. 1 A.C. 307. The following cases may be consulted as to the facts which prove or disprove probable cause. No probable cause: *Torrance* v. *Jarvis* (1856) 13 U.C.Q.B. 120 [fair assignment of property and an acceptance of salaried position as clerk in the winding up of the estate]: *Renaud* v. *Vandusen* (1872) 21 L.C. Jur. (Q.B.) 44 [trader domiciled in country to which he was going and constantly travelling to the one where the writ was applied for] It is not justifiable to arrest a person who returns to his own country after a residence of several years abroad, where his departure in the first instance had followed an assignment for the benefit of his creditors, the bona fides of which was not impeached by the arresting party himself or any other creditor. His departure being free from fraud, he acquires a legal domicile in the foreign country, so far as his creditors are concerned, and is entitled to return home without becoming liable to a charge of fraud: *Drapeau* v. *Deslaurier* (1888) 32 L.C. Jur. (Cour de Rev.) 191. In the same case the fact that the plaintiff had given proofs of his intention to remain in the country by buying land and making a contract for the erection of a house thereon, was also mentioned among the grounds upon which it was held unjustifiable to arrest him for fraud. Probable cause: *Wanless* v. *Matheson* (1837) 15 U.C.Q.B. 278 [plaintiff, overwhelmed with debts, had assigned all his personal property, had broken faith with the defendants, had been detected in several misstatements, and was reported to have absconded]: *Hartubise* v. *Bourret* (1879) 23 L.C. Jur. (Q.B.) 130 [refusal to pay debts by debtor able to do so—no leviable property—presence in country due to family affairs calling for a few hours' stay]: *Lajeunesse* v. *O'Brien* (1874) 5 Rev. Leg. (S.C.) 242 [plaintiff abandoned premises leased from defendant when rent came due, having sold some of his stock, and left behind some trifling personal effects].

Any statement made by the debtor himself from which it may be inferred that his removal from the country will be permanent, warrants his arrest. (*y*)

(*l*) *Fraudulent insolvency*—Proof that an embarrassed debtor secreted his furniture and effects, and made fraudulent and fictitious transfers to his relatives just prior to an assignment for the benefit of his creditors, shows the existence of probable cause for his arrest. (*z*)

(*m*) *Procuring injunction restraining payment of dividend by company*—Sufficient probable cause exists for a shareholder's procuring an injunction against the payment of a dividend, when the annual report contains misstatements. (*a*)

III. PROVINCES OF COURT AND JURY RESPECTIVELY IN DETERMINING THE EXISTENCE OF PROBABLE CAUSE.

8. Reasonable and probable cause, existence of, a mixed question of law and fact—The doctrine established by the authorities is that the existence of probable cause is a question exclusively for the court only when there is no controversy either as to the facts upon which the solution of the various subordinate issues which it involves is dependent.

"The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable or not probable are true and existed is a matter of fact; but whether, supposing them true, they amount to probable cause, is a question of law." (*a*) "It is for the jury to say whether the facts pleaded were proved, and for the judge to determine whether or not they amounted to reasonable and probable cause." (*b*) "The prevailing law of reasonable and probable cause is that the jury are to ascertain certain facts, and the judge is to decide whether those facts amount to such cause. (*c*)

(*y*) *Benjamin* v. *Wilson* (1850) 1 L.C.R. (S.C.) 351; *Debien* v. *Marsaut* (1863) 14 L.C.R. (S.C.) 89; *Berry* v. *Dixon* (1854) 4 L.C.R. (S.C.) 218; *Wilson* v. *Reid* (1854) 4 L.C.R. (S.C.) 157.

(*z*) *Poulin* v. *Ansell* (1874) 5 Revue Legale S.C. 251.

(*a*) *Montreal, &c., R. Co.* v. *Ritchie* (1889) 16 Can. S.C. 622 (decided with reference to the law of Quebec).

(*a*) *Johnstone* v. *Sutton* (1786) 1 T.R. 493, per Lords Mansfield and Loughborough (p. 543).

(*b*) Maule, J., in *West* v. *Baxendale* (1850) 9 C.B. 141.

(*c*) *Turner* v. *Ambler* (1847) 10 Q.B. 252, per Lord Denman. Similar language is used in *Broad* v. *Ham* (1839) 5 Bing. N.C. 722; *Davis* v. *Russell* (1829) 5 Bing. 354; *Haddrick* v. *Heslop*, 12 Q.B. 267, aff'd (in Exch. Ch.) 12 Q.B. 928; 23 L.J. Q.B. 49; *Weston* v. *Beeman* (1857) 27 L.J. Exch. 57; *Hailes* v. *Marks* (1861) 7 H. & N. 56; *Busst* v. *Gibbons* (1861) 30 L.J. Exch. 75; *Ayres* v. *Elborough* (nisi pr. 1870) 22 L.T.N.S. 106, per Blackburn, J.; *Kelly* v. *Midland, &c., R. Co.* (1872) Ir. Rep. 7 C.L. 8; *Lucy* v. *Smith* (1852) 8 U.C. Q.B. 518; *Joint* v. *Thompson*

The full scope and significance of this doctrine was definitely settled by the Exchequer Chambers in the leading case of *Panton* v. *Williams*, (*d*) which, although it was not accepted without some expressions of dissatisfaction on the part of individual judges (*e*) is now regarded as the fountain of law upon this subject. (*f*) The principle there formulated was this: Whether the question of reasonable or probable cause depends upon a few simple facts, or upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury that, if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable and probable cause, the result being that the question of fact is left to the jury, and the abstract question of law to the judge. Commenting on the cases, which might be thought to have somewhat relaxed the application of the rule, by seeming to leave more than the mere question of the facts proved to the jury, Chief Justice Tindal said:

"It will be found on further examination that, although there has

(1867) 26 U.C. Q.B. 519: *Hawkins* v. *Snow* (1895) 27 Nov. Sc. 408: *Cundell* v. *London* (1785), cited in *Johnstone* v. *Sutton*, 1 T.R. 493 (p. 520); *Huntley* v. *Simson* (1857) 2 H. & N. 600: *Donnelly* v. *Bowden* (1877) 40 U.C. Q.B. 611: *Archibald* v. *McLaren* (1892) 21 Can. S.C. 588. In some cases we find it laid down that the question of probable cause must be left to the jury where the decision depends on disputed questions of fact: *Wilson* v. *Winnipeg* (1887) 4 Man. L.R. 193. Compare *Vincent* v. *West* (1868) 1 Hannay (N.B.) 290. From the cases cited in sec. 12, however, it is plain that this is correct only in the sense that the judge must take the opinion of the jury on such facts as a step in the process of determining the defendant's liability. The final decision must always rest with him whether it is arrived at by means of special findings or by means of instructions couched in a hypothetical form. In *Martin* v. *Lincoln* (1668), cited in Bul er N.P. 13, it was held to be in the discretion of the court to direct the jury, if there were manifest proof that there was no cause of action. In the earliest reported cases the question was treated as a matter of pleading. Thus in an action for conspiracy and procuring the plaintiff to be maliciously indicted for robbery, a plea setting forth the fact of the robbery and circumstances of suspicion was held good on demurrer, as it confessed procuring the indictment and avoided by matter of law: *Pain* v. *Rochester*, Croke Eliz. 871; *Chambers* v. *Taylor*, Croke Eliz. 900. In *Rochester* v. *Whitfield* (1595) Croke Eliz. 871, the court held, on demurrer, that a plea setting out the circumstances whereby the defendants came to indict the plaintiff was good "for their causes of suspicion are sufficient, . . . and the imprisonment need not be answered when the indictment is grounded upon good cause."

(*d*) (1841) 2 Q.B. 169.

(*e*) See especially the remarks of Denman, C.J., in *Rowlands* v. *Samuel* (1847) 11 Q.B. 39 (note); 17 L.J. Q.B. 65. Both reports, however, leave the precise grounds of his disapproval rather obscure.

(*f*) "There can be no doubt, since the case of *Panton* v. *Williams*, 2 Q.B. 169, that reasonable and probable cause in an action for malicious prosecution or for false imprisonment is to be determined by the judge." Lord Chelmsford in *Lister* v. *Perryman* (1879) L.R. 4 H.L. 521 (p. 535).

be an apparent, there has been no real, departure from the rule. Thus, in some cases the reasonableness and probability of the ground for prosecution has depended, not merely upon the proof of certain facts, but upon the question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. (*g*) Again, in other cases, the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not; (*h*) in other cases the inquiry has been, whether from the conduct of the defendant himself the jury will infer that he was conscious he had no reasonable or probable cause But in these and many other cases which might be suggested, it is obvious that the knowledge, the belief and the conduct of the defendant are really so many additional facts for the consideration of the jury; so that, in effect, nothing is left to the jury but the truth of the facts proved, and the justice of the inferences to be drawn from such facts, both which investigations fall within the legitimate province of the jury, whilst, at the same time, they have received the law from the judge, that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable cause for the prosecution, or the reverse." . . . . . "Such being the rule of law, where the facts are few and the case simple, we cannot hold it otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts and inferences from facts are made out to their satisfaction. But it is equally certain that the task is not impracticable; and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them."

(*g*) In *James* v. *Phelps* (1840) 11 Ad. & E. 483, Lord Denman had said, in the course of his opinion, that "the question whether there be or not reasonable or probable cause may be for the jury or not, according to the particular circumstances of the case." But this was a case where the evidence suggested that the defendant knew that an essential ingredient of the offence charged was lacking. See also sec. 10 (*d*) infra.

(*h*) In *Wedge* v. *Berkeley* (1837) 6 Ad. & E. 663, the court held that both the bona fides of the defendant, a magistrate, and also the question whether there was reasonable cause for a magistrate's detaining goods on a suspicion that they were stolen was for the jury. But this ruling is deprived of much of its significance by the fact that it was made on the course of a judgment which upheld the action of a judge in leaving the case to the jury upon instructions that they were to find whether there were "reasonable grounds of suspicion." It may be reconciled with the general current of the authorities by assuming that the real question which the trial judge intended to leave to the jury was merely whether the defendant believed in the guilt of the plaintiff (see sec. 10 (*b*) and (*c*) post).

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.

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 for 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

A fortiori must it be the proper cause for a judge to decide as to the existence of probable cause where the only question to be determined is, in the strict sense of the term, one of law, e.g., whether a letter written by the plaintiff should be construed in such a sense as to bring the writer within the purview of the statute 7 & 8 Geo. IV., c. 29, sec. 8, as to extorting money by threatening a criminal prosecution. (*d*)

But the task of further delimitation between the provinces of court and jury is beset with the difficulties which are inseparable from a system which puts in the hands of a judge the decision of a question which, according to all analogy, should be left to the jury. (*e*) As long as we are restricted to general language, the boundary of the power of the court to determine, unaided, whether there was probable cause seems to admit of no more precise description than that contained in the following passage of the opinion of Baron Alderson in *Mitchell* v. *Williams*. (*f*)

"The judge has a right to act upon all the uncontradicted facts of the case, and it is not necessary specifically to leave every fact to the jury—to ask them, for instance, 'Do you believe this? Do you believe that? Do you think that was so-and-so?' It is only where some doubt is attempted to be thrown upon the credulity of the witnesses, or where some contra-

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expresses the opinion that the plaintiff has failed to make out a want of probable cause, but subsequently, at the request of counsel, puts the case to the jury, telling them that, to entitle the plaintiff to a verdict, they must be satisfied that there was a total absence of reasonable and probable cause, and that the defendant acted with malice, a verdict for the defendant should be set aside on the ground of misdirection, as it is possible that the jury may have come to a conclusion on the question of malice different from that at which they would have arrived had the question been properly presented to them: *Gibbons* v. *Alison* (1846) 3 C.B. 181. Where no special grounds are suggested why the defendant should have disbelieved his informant, it is error to leave it to the jury to decide whether he did believe what he was told: *Smith* v. *McKay* (1853) 10 U.C.Q.B. 412; second app., p. 613. So also, if the trial judge is of opinion that want of probable cause has not been established by the evidence, it is error necessitating a new trial, if he does not nonsuit the plaintiff, or does not direct a verdict for the defendant, if the plaintiff insists on going to the jury: *Tyler* v. *Babington* (1848) 4 U.C. (Q.B.) 202. And if he has ruled that there was probable cause, verdict for the plaintiff will be set aside by a court of review: *Goldwin* v. *Crowle* (1751) Sayer's Rep. 1.

(*d*) *Blachford* v. *Dod* (1831) 2 B. & Ad. 179.

(*e*) The difficulty of drawing the line between the questions which are appropriately submitted to the jury and those which are appropriately settled by the judge without the intervention of the jury has not infrequently been commented upon: See, for example, *Davis* v. *Russell* (1829) 5 Bing. 354: in *Rice* v. *Saunders* (1876) 26 U.C.C.P. 27.

(*f*) (1843) 11 M. & W. 205 (p. 217), quoted with approval in *Riddell* v. *Brown* (1864) 24 Upp. Can. Q.B. 90.

diction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that the judge is called upon to submit any question to the jury."

The converse situation which demands the interposition of a jury has been thus described by one of the most eminent of modern English judges:

"If there be facts in dispute upon which it is necessary he should be informed in order to arrive at a conclusion on this point, those facts must be left specifically to the jury; and when they have been determined in that way, the judge must decide as to the absence of reasonable and probable cause. (*g*)

It is obvious that the rule by which, so long as the facts are not in dispute, a judge has a right to decide, without the intervention of a jury, whether there was probable cause, involves, as a legitimate corollary, the doctrine that this question must remain one for the judge, although the undisputed facts adduced by each party separately point to different conclusions. In other words, although the judge is not entitled to pronounce upon the effect of evidence which is conflicting in the sense that more than one inference may be drawn from it, he is warranted in determining the effect of evidence which is conflicting in the sense that the materials furnished for the decision consist of distinct groups of specific facts, of which one establishes and the other negatives the existence of probable cause.

Hence, where a witness who has given testimony which justifies the inference that the defendant had probable cause for preferring a charge is unimpeached in his general character, and uncontradicted by testimony on the other side, and there is no want of probability in the facts which he related, a judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly, even though, up to the time when the witness had so testified, the evidence put in showed prima facie a want of probable cause. (*h*)

(*g*) *Brown* v. *Hawks* (1891) 2 Q.B. 718, per Lord Esher (p. 726). Compare the statements that the opinion of the jury must be taken if the facts are contradicted, or not of that distinct character that there can be no question as to the correct inference to be drawn from them: *Erickson* v. *Brand* (1888) 14 Ont. App. 614, per Osler, J. A. (p. 654); and that it is not the judge's province to decide contradictory facts and form conclusions as to the weight of evidence and the credibility of witnesses: *Hamilton* v. *Cousineau* (1892) 19 Ont. App. 203. [In this case the dissent of Burton, J. A., was merely on the ground that the facts were really undisputed, and not upon general principles.]

(*h*) *Davis* v. *Hardy* (1827) 6 B. & C. 225. The effect of this decision has been said in a Canadian case to be that, although the evidence offered by the plaintiff shows, in the opinion of the presiding judge, a want of reasonable and probable

11. Illustrative cases — The scope of the general principles enunciated above will become plainer if we set forth, under convenient headings, the effect of some specific rulings of the courts upon the propriety of submitting to or withholding from the jury certain questions.

(*a*) *The trustworthiness of the materials*, i.e., "not the legal inference to be drawn from them, but the worth of them,"—from which the defendant formed his opinion as to the guilt of the plaintiff, is a question of fact not of law. (*a*)

(*b*) *Whether the defendant entertained a bona fide belief in the guilt of the plaintiff* is a question properly submitted to the jury, where the evidence suggests that the existence of such a belief on his part is doubtful, (*b*) or, as another case puts it, where the facts and inferences are doubtful, the bona fides of the defendant must be determined by a jury. (*c*)

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cause, yet, if the defendant subsequently adduces facts which satisfy him that there was reasonable and probable cause, a nonsuit may properly be granted: *Riddell* v. *Brown* (1864) 24 U.C.Q.B. 90. where it was held that, as unimpeached witnesses had established facts sufficient to justify the inference that the plaintiff was about to leave the country, his arrest was warrantable, though he offered testimony shewing, prima facie, that he had no such intention.

(*a*) *Abrath* v. *North Eastern R. Co.* (C.A. 1883) 11 Q.B.D. 440, per Bowen, L.J. (p. 460).

(*b*) *Darling* v. *Cooper* (1869) 11 Cox Cr. Cas. 533: *Wedge* v. *Berkeley* (1837) 6 Ad. & E. 663.

(*c*) *Broad* v. *Ham* (1839) 5 Bing. N.C. 722: Where the defendant is shewn to have made a charge of perjury upon information given to him, it is properly left to the jury to say whether he believed that information: *Haddrick* v. *Heslop* (1848) 12 Q.B. 267. A judge is warranted in leaving to the jury the question of the existence of probable cause upon the following state of facts: Plaintiff, a servant, being discharged on a Friday, took away with her from her master's house a trunk and bag, the property of her master. The master wrote to her the next day demanding his property, and threatening to proceed criminally on the Monday following, if it were not restored. The plaintiff being absent from home when the letter arrived, no answer was returned, whereupon the master, the same day (Saturday), had her taken in custody, but, when she was brought before the magistrates on Monday, declined to make any charge: *M'Donald* v. *Rooke* (1835) 2 Bing. N.C. 217. Whether the utterance of words susceptible of the construction that the speaker intended to threaten another person's life constitutes a reasonable and probable cause for laying a charge against him depends on the question in what sense the words were used, to whom they were addressed, and whether they were believed by the party against whom they were directed. Hence, if there are facts which raise a doubt whether the accuser believed the reality of the threat, it is the duty of the judge to take the opinion of the jury upon the issue, whether the accuser believed the charge, or whether it was altogether colourable: *Venafra* v. *Johnson* (1833) 10 Bing. 301 (nonsuit set aside). Whether the defendant acted bona fide on the opinion obtained from counsel is a proper question to submit to the jury: *Fellowes* v. *Hutchinson* (1855) 12 U.C.Q.B. 633. Where the evidence points to the conclusion that the detention of the defendant's property on which he based a charge of theft against the plaintiff was made under a bona fide claim of right, he cannot complain of the action of the judge in leaving the question of his belief in the guilt of the plaintiff to the jury: *Alward* v. *Sharp*

(c) *The reasonableness of defendant's belief* in the justifiability of the proceedings is also a question for the jury. "The belief of the accuser in the guilt of the accused; his belief in the existence of the facts on which he acted, and the reasonableness of such last-mentioned belief, are questions of fact for the jury, whose findings upon them become so many facts from which the judge is to draw the inference, and determine whether they do or do not amount to reasonable and probable cause." (*d*) The rule is the same whether a question is made as to the reasonableness or otherwise of the

(1868) 1 Han. (N.B.) 227: *Abell* v. *Light* (1868) 1 Han. (N.B.) 240. In an action for maliciously causing the plaintiff to be adjudicated a bankrupt, it is proper to take the opinion of the jury upon the question whether the plaintiff really believed the proceedings taken were well-founded: *Johnson* v. *Emerson* (1871) L.R. 6 Exch. 329 (p. 351) [a case where the proceedings had been stopped pending appointment by the registrar for the examination of sureties]. In an action for maliciously procuring an order for the arrest of a debtor, on the ground that he is about to quit the country with intent to defraud the complainant, the judge should not undertake to rule on the question of probable cause without taking the opinion of the jury, whether the defendant honestly believed that the plaintiff was going away with intent to defraud; and, secondly, whether he had reasonable grounds for so believing: *Erickson* v. *Brand* (1888) 14 Ont. App. 614.

(*d*) *Hicks* v. *Faulkner* (1881) 8 Q.B.D. 167. In *Davis* v. *Russell* (1829) 5 Bing. 354, the plaintiff, an elderly woman, had been lodging with one, H., at the time the trunk of the latter had been broken open and certain articles taken therefrom. After her removal from the house a letter arrived for her, and the defendant, R., a constable, was induced to break it open by her declaration that she believed, from her examination of the ends of the letter (this was before the days when letters were commonly enclosed in envelopes)—that it contained some allusion to the robbery. The letter purported to be from an accomplice demanding money from the plaintiff as a joint perpetrator, and, upon reading it, R. arrested the plaintiff. Held, that, upon these facts, a nonsuit would have been improper, and that it was necessary to leave it to the jury to say whether, admitting the facts, the defendant acted honestly, or, in other words, whether, under the same circumstances, they would have done as he did. An instruction, putting these questions to the jury, was held to be, in effect, an intimation that, if they were of opinion that an affirmative answer should be returned, the defendant stood excused. In an action for wrongful arrest on the ground that the plaintiff was about to leave the country with intent to defraud, &c., where it is shewn that the defendant suppressed certain facts known to him which might, if stated, have satisfied the judge that the plaintiff was not about to leave the country, the question of probable cause cannot be decided until the jury determines (1) whether or not the defendant, in spite of his knowledge of the facts, honestly believed the plaintiff was going away with intent to defraud his creditors, and (2) whether he had reasonable ground for so believing: *Erickson* v. *Brand* (1888) 14 Ont. App. 614. A burglary had been committed in the defendant's store, and on the floor was found a bill of an account due from the plaintiff to the defendant. The paper was soiled and crumpled, and looked as if it had been carried for some time in some person's pocket. The defendant thereupon procured a warrant for the search of the plaintiff's premises. On the trial of the action for damages evidence was given both that the document had, and that it had not, been sent to the plaintiff. Held, that the judge, instead of dismissing the action on the ground that there was no evidence of a want of probable cause, should have taken the opinion of the jury on these four questions: (1) whether the account had, in fact, been sent to the plaintiff; (2) whether it had been found, as alleged, after the burglary, in the shop; (3) if it had not been sent, did the defendant believe that it had been sent; (4) if he did so believe, were the circumstances on which his belief was based such as to warrant a reasonable man of ordinary prudence in forming such a belief: *Young* v. *Nichol* (1885) 9 Ont. R. 347.

defendant's belief relates to the reliability of his own recollection or to the accuracy of information received from others. (*e*)

A reasonable belief that goods were stolen does not furnish probable cause for a charge of felony against a person in possession of the goods; but the other facts may be such that this is the sole circumstance wanting to complete the reasonable and probable cause, and, when such a case arises, the trial judge acts correctly in taking the opinion of the jury on the point whether there was reasonable ground for the defendant's belief as to the identity of the property. (*f*)

Where the defendant took the opinion of counsel, the questions whether the facts were fully and honestly laid before him, and also whether he acted bona fide on the opinion given, are for the jury. (*g*)

(*d*) *Defendant's knowledge of material facts*—The question whether the defendant possessed an actual knowledge of certain facts presents an appropriate issue for the jury in two cases: (1) where the point in dispute is his knowledge of the existence of the circumstances which tend to shew reasonable and probable cause, for unless he knew them he cannot be said to have acted on them; (*h*) (2) where the evidence raises the question whether the defendant was aware of exculpatory circumstances when he instituted the proceedings complained of. (*i*)

(*e*) *Whether defendant exercised reasonable care in verifying his information, how far a question for the jury*—As we have already seen (sec. 7, *e*, ante), it is material, under certain circumstances, to determine whether the defendant was justified in proceeding without verifying the information on which he acted. Sometimes that question may be appropriately put to

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

(*f*) *Douglas* v. *Corbett* (1856) 6 El. & Bl. 611, per Coleridge and Crompton, JJ. Erle, J., dissented, on the ground that the judge had made the question of the existence of probable cause depend upon the one fact whether the defendant had reasonable ground for believing the property to be his. He could not think this sufficient, as, if it were, he did not see what would hinder many questions of civil right being tried in criminal prosecutions. The particular facts of the case were these: Certain sheep, offered for sale at a market, were claimed by the defendant as his own, stolen from him some months previously. The plaintiff asserted that they were part of a lot belonging to him, which he had had for several months, and invited the defendant to come to his farm and see the rest of the lot. The defendant did so and claimed one of those he saw, and proceeded to lead it away. The plaintiff appealed to a neighbour, who, after examining the sheep, said it did not belong to the lot which he said he knew the plaintiff had purchased. The defendant then took away the sheep, and, upon being sued for conversion, laid an information against the plaintiff for theft. The opinion of the majority of the court is supported by *Darling* v. *Cooper* (1869) 11 Cox Cr. Cas. 533: *Goodge* v. *Sims* (1884) 1 Times L.R. 35.

(*g*) *Martin* v. *Hutchinson* (1891) 21 Ont. R. 388: *Fellowes* v. *Hutchinson* (1855) 12 U.C.Q.B. 633.

(*h*) *Turner* v. *Ambler* (1847) 10 Q.B. 252.

(*i*) *James* v. *Phelps* (1840) 3 Perry & D. 231; 11 Ad & E. 483.

the jury. (*j*) But where the facts proved by the defendant before the magistrates were all undisputed, the judge ought not to leave to the jury the question whether the defendant took reasonable care to inform himself of the true facts of the case. "If," said Cave, J., in a recent case, "wherever the judge is of opinion that there is a prima facie case of reasonable and probable cause, he is still bound to ask the jury whether the defendant took reasonable care to inform himself of the whole of the facts, the result will be that the jury will always be able to overrule the view of the judge by finding that the defendant did not take such reasonable care." (*k*) In the Court of Appeal, Lord Esher expressed (p. 726) his complete concurrence with these views, and an additional reason for adopting the rule thus laid down was pointed out by Kay, L.J., viz., that the result of holding otherwise would be that a finding of a jury that the defendant did not take proper care to inquire into the facts would, without more, determine the action in favour of the plaintiff, and render a further investigation into the question of malice superfluous.

(*f*) *Motive of defendant*—Among the facts to be determined by the jury are the motives of the prosecutor. Thus, where the defendant, though he was in court when the plaintiff was on trial on a charge of perjury, did not testify in support of the charge, a judge acts properly in leaving the case to the jury under an instruction that, if they thought that this non-appearance as a witness arose from a consciousness that he had no evidence to give which could support the indictment, there was want of probable cause for instituting the prosecution. (*l*)

(*j*) See *Loog* v. *Nahmaschinen, &c., Gesellschaft* (1884) 4 Times L.R. 208, where Stephen, J., submitted to the jury the questions whether the defendants had taken proper care to inform themselves as to the facts; and *Goudge* v. *Sims* (1884) 1 Times L.R. 35, where Hawkins, J., took the same course. In *Grant* v. *Booth* (1893) 25 Nov. Sc. 266, one of the grounds which Townshend, J., held, that the verdict for the plaintiff should be set aside was, that as the facts were not in dispute, the judge was wrong in putting to the jury the question: "Did the defendant take reasonable pains to ascertain the true facts of the case?" McDonald, C.J., on the other hand, thought that the action of the trial judge was quite proper, as "a man who sends his bottles broadcast over a city to everyone who buys his beverages has no right to charge anyone who has those bottles in his possession with theft without at least taking some little pains to learn whether wrong was intended." Where the defendant trusted to his memory in regard to the existence of a fact which influenced him materially in instituting the proceedings, the jury may be asked whether it was prudent of him to rely on his memory: *Young* v. *Nichol* (1885) 9 Ont. R. 347.

(*k*) *Brown* v. *Hawks* (1891) 2 Q.B. 718. Where there is nothing in the evidence to suggest any doubt in the mind of the trial judge as to the bona fides of the defendant or his belief in the truth of the statement on which he acted, he is not bound to take the opinion of the jury on these points: *Archibald* v. *McLaren* (1892) 21 Can. S.C. 588, see especially per Gwynne, J. (p. 596) To the same effect see the remarks of Street, J., and Burton, J.A., in *Hamilton* v. *Cousineau* (1892) 19 Ont. App. 203.

(*l*) *Taylor* v. *Willans* (1831) 2 B. & Ad. 845; 6 Bing. 183. Compare the ruling that, whether the reasonable and probable cause was not only deducible in point of law from the facts, but existed in the defendant's mind at the time of his

12. Alternative methods of taking the opinion of a jury—The following lucid statement of principles is extracted from the opinion of Lord Justice Bowen in the leading case of *Abrath* v. *North-Eastern R. Co.* (*a*)

(1) A judge may leave to the jury to find a general verdict explaining to the jury what the disputed facts are, and telling them that, if they find the disputed facts in favour of one side or the other, his opinion as to reasonable and probable cause will differ accordingly, telling them what, in each alternative, his view will be, and enabling them to apply that statement with reference to the issue as to malice; that is a way which in a very simple kind of case may be adopted. (*b*) . . . . . .

(2) A course which judges have been in the habit of adopting where there are circumstances of complication is this: The judge may tell the jury what the issues or questions are, and at the same time inform them what will be the effect upon the verdict which they will ultimately be asked to find of the answers they give to the specific questions, leaving the jury both to answer the questions and then to find a verdict after he has explained to them what result the answers to the questions will involve. (*c*)

. . . . . .

(3) . . . . . A third way in which a judge may conduct the trial is by asking the jury specific questions, and not leaving it to them to find the verdict, but entering the judgment upon their findings himself. (*d*)

Lord Tenterden considered the correct rule to be this: If there be any fact in dispute between the parties, the judge should

proceeding, is probably rather an independent question for the jury, to be decided on their view of all the particulars of the defendant's conduct than for the judge, to whom the legal effect of the facts only is more properly referred: *Turner* v. *Ambler* (1847) 10 Q.B. 252.

(*a*) (1883) 11 Q.B.D. 440 (p. 458).

(*b*) Cases supporting this statement are *Weston* v. *Beeman* (1857) 27 L.J. Exch. 57: *Darling* v. *Cooper* (1869) 11 Cox C.C. 533: *Heslop* v. *Chapman* (Exch. Ch. 1853) 23 L.J. Q.B. 49: *Rowland* v. *Samuel* (1847) 11 Q.B. 39 (p. 50): *Cox* v. *Gunn* (1876) 2 R. & C. (Nov. Sc.) 528: *Fellowes* v. *Hutchinson* (1855) 12 U.C. Q.B. 633.

(*c*) In *Martin* v. *Hutchinson* (1871) 21 Ont. Rep. 388, it seems to be implied that this is the only proper course where the facts are numerous and complicated. But this theory is inconsistent with the fundamental principles laid down in *Panton* v. *Williams*, sec. 7 ante, and not justified by the language in the text.

(*d*) "Some judges," said Jarvis, C.J., in *Heslop* v. *Chapman* (1853) 11 Jur. 348, "ask the jury several questions, and say: 'If you answer these questions, I will then determine whether there is reasonable and probable cause.'" Cases where this course was taken are *Douglas* v. *Corbett* (1850) 6 El. & Bl. 611 [special finding taken as to reasonableness of defendant's belief in guilt of plaintiff]. *Long* v. *Nahmaschinen, &c. Gesellschaft* (1884) 4 Times L.R. 208, (sec. 7, c, ante) [special finding taken as to reasonableness of belief]: *Young* v. *Nichol* (1885) 9 Ont. Rep. 347 [Special finding asked, whether defendant was prudent in relying on his memory].

e the question of probable cause to the jury, telling them, if y should find in one way as to that fact, then, in his opinion, there was no probable cause, and their verdict should be for the plaintiff; if they should find in the other way, then there was, and their verdict should be for the defendant. (*e*)

In various judgments we find passages like these:

"The jury must first find the facts which are supposed to constitute the probable cause." (*f*) "If the facts are doubtful, the jury must come to the conclusion of fact before the judge determines the effect of it in law." (*g*) "If the existence of the facts relied on by the plaintiff be a question, then the jury must decide upon it, and, upon that finding, the judge declares the law." (*h*)

That these remarks, however, are not to be construed as laying down any general rule as to a definite succession of time, and merely mean that disputed facts must be settled by the jury at some stage of the proceedings before the judge can draw his inferences as to the existence or absence of probable cause, is apparent from the cases above cited. That is to say, a judge is not obliged to give a ruling that there was no reasonable and probable cause before he asks the jury whether there was malice. He may ask the jury to find and answer different questions, and get such and such answers, and on those answers he can say whether there is or is not such cause. (*i*)

A practical application of these general principles is that a judge may, where the existence or non-existence of a belief on

(*e*) *Blachford* v. *Dod* (1831) 2 B. & Ad. 179; approved in *Riddell* v. *Brown* (1864) 24 U.C.Q.B. 90. In another early case Park, J., after remarking that it is the province of the judges to determine, as a point of law, whether there was probable cause, proceeded thus: "But as that must be compounded of the facts, and as the jury must decide on them, my practice has been to say: 'You are to tell me whether you believe the facts stated on the part of the defendant, and, if you do, I am of opinion that they amount to a reasonable and probable cause for the step he has taken.' I do not direct a nonsuit, because the facts are so closely connected with the law": *Davis* v. *Russell* (1829) 5 Bing. 354. A more succinct statement is that "the judge is to give his opinion on the law, and to leave the jury to determine the facts": *Taylor* v. *Willans* (1831) 2 B. & Ad. 845; 6 Bing. 183, holding that a summing up properly separates the law from the fact where the judge tells the jury that, if they think the prosecution had a certain motive for his conduct, then there was probable cause; but, if he had not that motive, then there was no probable cause."

(*f*) *Davis* v. *Russell* (1829) 5 Bing. 354.

(*g*) *Broad* v. *Ham* (1839) 5 Bing. N.C. 722, per Bosanquet, J.

(*h*) *Torrance* v. *Jarvis* (1856) 13 U.C.Q.B. 120.

(*i*) *Shrosbery* v. *Osmaston* (C.P.D. 1876) 37 L.T.N.S. 792, per Lindley, J.

the defendant's part that the plaintiff was guilty is the turning point of the case, direct the jury to find for or against the defendant, according as they are of opinion that he did or did not entertain such belief (*j*) A similar course may be pursued where the essential question is whether the belief was justifiable.

Thus, in an action for maliciously indicting the plaintiff on a charge of assault, where the evidence is that the assault was committed in removing the defendant from the plaintiff's premises, after he had refused to leave them, the case is properly submitted to the jury, where the judge states that, if they thought the indictment was preferred by the defendant with a consciousness that he was wrong, it is without reasonable or probable cause; but that, if more violence was used than was necessary, there was reasonable and probable cause for the prosecution. Alderson, B., said: "This is tantamount to calling on the jury to inquire whether or not the facts are such that no reasonable man could have supposed the assault to be excessive. If that be the result of the facts, there was clearly no reasonable and probable cause for laying the indictment." (*k*)

A referee's finding of want of reasonable or probable cause is not a finding of law, but is equivalent to a verdict for the plaintiff, rendered by a jury, under instruction by a judge as to what would be evidence of reasonable and probable cause. (*l*)

13. The anomalies of the accepted doctrine have not infrequently been the subject of judicial comment. The most obvious objection to it, of course, is that it assigns to the court the function of drawing inferences from the specific testimony presented, and thus does violence to the most characteristic of all the principles by which the common law system of procedure is regulated.

(*j*) *Winfield* v. *Kean* (1882) 1 Ont. R. 193; *Milner* v. *Sanford* (1893) 25 Nov. Sc. 227. Where the evidence raises the question whether the defendant believed and had reasonable ground for believing that the plaintiff was guilty of theft, as where both parties claim the land from which the articles (fence poles) were taken, it is not error to leave the case to the jury, telling them what would or would not be probable cause, according to the inferences they might draw from the facts as to the defendant's motives and belief: *Howard* v. *Sharp* (1868) 1 Hannay (N.B.) 286.

(*k*) *Hinton* v. *Heather* (1845) 14 M. & W. 131. Rolfe, B., pointed out that, although a finding that there had been no excess would not necessarily show that there was not probable cause, a finding for the plaintiff on this direction implied that there was no excess, and that the defendant knew there was no excess. In *Shrewsbery* v. *Osmaston* (C.P.D. 1878) 37 L.T.N.S. 792, Denman, J., thought that the question whether the belief of the defendant was warrantable should be put to the jury in this form: Were the circumstances such that a reasonably fair person, acting with a fair and unprejudiced mind, would have acted on them and considered them as sufficient cause for acting.

(*l*) *Fawcett* v. *Winters* (1887) 12 P.R. (Ont.) 232.

"It is impossible to enumerate as a distinct proposition what is or is not probable cause; which has made me doubt, or at least regret, probable cause being matter of law."(*a*) "The existence of 'reasonable and probable cause' is an inference of fact. It must be drawn from all the circumstances of the case. I regret, therefore, to find the law to be that it is an inference to be drawn by the judge and not by the jury."(*b*)

One of the inconveniences arising from this departure from ordinary practice was pointed out by Lord Colonsay in the case last cited, viz., that the rule according to which the existence of probable cause was established by shewing a state of circumstances upon which a reasonable and discreet person would have acted involved the anomaly that the judge had to determine, not what impression the circumstances would have made on his own mind, he being a lawyer, but what impression they ought to have made on the mind of another person, probably not a lawyer. A more serious defect in the doctrine is that the result of allowing it to operate in connection with the rule, already referred to (sec. 2 ante), that the jury are entitled to consider the absence of probable cause among the circumstances bearing upon the question whether the defendant was actuated by malice is that, as was pointed out in a recent case, there may be two different and opposite findings in the same cause upon the same question of probable cause, one by the jury and the other by the judge. (*d*)

(*a*) *Broughton* v. *Jackson* (1852) 18 Q.B. 378, per Lord Campbell.

(*b*) *Lister* v. *Perryman* (1870) L.R. 4 H.L. 521, per Lord Westbury. Compare the remarks of Lord Chelmsford (p. 535), who said he was at a loss to understand in what o[t]her sense the existence of probable cause could be termed a question of law than that it was determined by the judge, and pointed out that the effect of the rule was that a verdict in cases of this description was only nominally the verdict of a jury. Lord Hatherley also regretted that the question of probable cause should not be left to the jury who, as they heard the evidence and saw the demeanour of the witnesses, would be in a good position to judge what degree of trust it was reasonable and proper that the person to whom the information was given should repose in his informant.

(*d*) *Hicks* v. *Faulkner* (1881) 8 Q.B.D. 167. "Absence of reasonable cause," said Hawkins, J., "to be evidence of malice, must be absence of such cause in the opinion of the jury themselves, and I do not think they could properly be told to consider the opinion of the judge upon that point if it differed from their own—as it possibly might, and in some cases probably would—as evidence for their consideration in determining whether there was malice or not. In no case, however, will their finding relieve the judge of the duty of determining for himself the question of reasonable cause as an essential element in the case. Want of reasonable cause is for the judge alone to determine upon the facts found, for the jury even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he bona fide believed to be

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

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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": *Savil* 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.

upon to give some "slight evidence" of the want of probable cause. (*f*) Especially is this principle applicable where the nature of the affirmation is such as to admit of proof by witnesses, and cannot depend upon matters lying exclusively within the party's own knowledge, as in some cases of criminal prosecution. (*g*)

The principle of the maxim, Omnia præsumuntur rite esse acta, is sometimes available in favour of the defendant. (*h*)

15. As to minor propositions involved in the proof of probable cause

The accepted doctrine is, that if, in order to shew the absence of reasonable and probable cause, there are minor questions which it is necessary to determine, the burden of proving the propositions involved in these minor questions lies upon the plaintiff, just as the burden of proving the absence of reasonable and probable cause lies upon him. (*a*)

(*f*) *Taylor* v. *Willans* (1831) 2 B. & Ad. 845, per Lord Tenterden (p. 857): S.P. *Barbour* v. *Gettings* (1867) 26 U.C.Q.B. 544.

(*g*) *Cotton* v. *James* (1830) 1 B. & Ad. 128, per Denman, C.J., where it was held that, in an action for maliciously suing out a commission of bankruptcy, where the act upon which the adjudication of the commissioners was founded was the removal of certain effects of the plaintiff, without the defendant's knowledge, and the circumstances under which the removal took place shewed that the act was clearly not one of bankruptcy, there is sufficient prima facie evidence of the want of probable cause to justify the court in leaving it to the jury to say whether or not the defendant had grounds for believing, when he sued out the commission that such an act had taken place.

(*h*) In an action for false arrest by a constable of the defendant railway company and a malicious prosecution, the plaintiff put in evidence the depositions of the defendant's witnesses, the contents of which were such as, if known to the defendant's agents before the arrest, would have given it reasonable cause for instituting the proceedings, but no evidence was given by either side that the defendant's agents were cognizant of the matter of these depositions. Held, that the presumption would be indulged that, according to ordinary course and practice, the legal adviser had inquired into the evidence the witnesses were about to give before he had them examined in court, and that he was really acting upon information which justified him in considering that there was reasonable and probable cause for the prosecution: *Walker* v. *South-Eastern R. Co.* (1870) L.R. 5 C.P. 640.

(*a*) *Abrath* v. *North Eastern R. Co.* (1883) 11 Q.B.D. 79, aff'd by Court of App. 11 Q.B.D. 440, and by the House of Lords 11 A.C. 247, approving the direction of Cave, J., to the effect that the onus was upon the plaintiff of proof that the defendants did not take reasonable and proper care to inform themselves of the true state of the case, and that they did not honestly believe the case which they laid before the magistrates. In this case (p. 451) Brett, M. R., thought that the want of reasonable care on the part of the defendant in receiving the information on which he acted might be described as a "fundamental" fact, in order to distinguish it from a fact which is merely evidence of something else, and therefore a fact which it was necessary to allege and prove, and not merely a fact which was evidence of something which is to be alleged and proved. The rule that the plaintiff has the burden of proving a want of honest belief on the defendant's part has also been applied in a case where the legal effect of acts indisputably committed was the question on which the rights

In two cases a doctrine more favourable to the plaintiff has been propounded. In one it was held that, if the plaintiff shews that he was innocent of the charge and states all he knows, the defendant then has the burden of proving that he acted bona fide in commencing criminal proceedings. (*b*) In the other it was remarked by Rolfe and Parke, BB., during the argument of counsel, and also intimated by the latter judge in his opinion that, when the plaintiff has proved facts shewing that there was no probable cause, it lies on the defendant to shew that he believed in the plaintiff's guilt, or that he was misled or acted in ignorance. (*c*) The authority relied upon was the following passage in the judgment of Lords Mansfield and Loughborough in *Johnstone* v. *Sutton*: "From the want of probable cause, malice may be, and most commonly is implied." (*d*)

Whether the doctrine thus indicated may not be a more reasonable one than that which has been adopted in *Abrath* v. *North Eastern R. Co.* seems to be fairly open to argument. It should not be forgotten that at least a portion of the circumstances by which the accuser in any particular instance was led to believe in the guilt of the accused are, in the nature of the case, likely to remain within the exclusive knowledge of the former, even after the latter has obtained all the information supplied in the course of the proceedings complained of. It would seem therefore that the analogies of a familiar principle of the law of evidence are strongly in favour of a rule which would ascribe due weight to the fact that this partial superiority of knowledge on the defendant's part exists under normal conditions, and require him to follow the plaintiff's proof of his innocence by stating at once the whole of the grounds upon which he took action. A doctrine which compels the plaintiff to meet a defence not yet formulated and founded on circumstances which will often be, to a large extent, a matter of mere conjecture on his part seems to be decidedly unjust.

of the parties hinged: *Turner* v. *Ambler* (1847) 10 Q.B. 252. "The unfair use of the charge," said Denman, C.J., "may prove malice, but does not raise any inference of a belief that there was no reasonable or probable cause, for the contrary belief is perfectly consistent with malice." Compare *Cotton* v. *James* (1830) 1 B. & Ad. 128, [sec. 14, note (*g*)].

(*b*) *Henderson* v. *Midland R. Co.* (1871) 20 W.R. 23 [non-suit held wrong: Bramwell, B., dissenting on the ground that the plaintiff had not produced all the evidence which was available.

(*c*) *Mitchell* v. *Williams* (1843) 11 M.&W., 205 (pp. 211, 213, 214).

(*d*) 1 T.R. 493 (p. 545).

V. PROBABLE CAUSE CONSIDERED WITH REFERENCE TO THE PENDENCY OR TERMINATION OF THE PROCEEDINGS COMPLAINED OF.

16. Pendency of the previous proceedings usually a bar to the action—The general principle is, that the question whether there was reasonable and probable cause for instituting the previous proceedings cannot be raised as long as these proceedings are still in progress.

"The averment of want of reasonable and probable cause is of no use, unless it is averred that no cause of action really existed, and the general rule is that this can only be shown by alleging a judicial termination, or other final event, of the suit in the regular course of it. . . . . "If the action is well grounded, you cannot have an action against the person bringing it, because it is spiteful; and the question whether it is well grounded or no cannot be tried until the first action is terminated." (*a*)

"It is a rule of law that no one shall be allowed to allege of a still depending suit, that it is unjust. This can only be decided by a judicial determination, or other final event in the regular course of it. That is the reason given in the cases which established the doctrine that, in actions for a malicious arrest or prosecution, or the like, it is requisite to state in the declaration the determination of the former suit in favour of the plaintiff, because the want of probable cause cannot otherwise be properly alleged." (*b*)

"An action for malicious prosecution cannot be maintained until the result of the prosecution has shown that there was no ground for it." . . . "It is manifestly a matter of high public policy that it should be so: otherwise the most solemn proceedings of all our Courts of Justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety challenged by an action of this kind." (*c*)

(*a*) Blackburn, J., during argument of counsel, in *Parton* v. *Hill* (1864) 12 W.R. 753.

(*b*) Willes, J., in *Gilding* v. *Eyre* (1861) 10 C.B.N.S. 592, citing *Waterer* v. *Freeman*, Hob. 266; *Parker* v. *Langley*, 10 Mod. 209; *Whitworth* v. *Hall*, 2 B. & Ad. 695, p. 698.

(*c*) *Metropolitan Bank* v. *Pooley* (H.L. 1885) L.R. 10 A.C. 210, per Lord Selborne. To the same effect see *Jones* v. *Givin* (1712); Gilbert's K.B. 185 (201); Lord Tenterden in *Webb* v. *Hill* (1828) 1 Moo. & M. 253; *Munce* v. *Black* (1858) 7 Ir. C.L. 475 (p. 479). "There is no distinction in this respect between an action for malicious prosecution by indictment, or for malicious arrest, and one for maliciously suing out a commission, if bankrupt": Littledale, J., in *Whitworth* v. *Hall* (1831) 2 B. & Ad. 695 [the court declining to accept the contention that the fact of its being in the discretion of the bankruptcy judge to determine the suit or not at his pleasure by superseders was not a sufficient reason for introducing an exception to the general rule. In *Munce* v. *Black*, supr., Pigot, C.B., distinguished the case (one

Ordinarily, therefore, the declaration must shew the original suit, wherever instituted, to be at an end, not merely because, if a different doctrine prevailed, he might recover in the action, and yet be afterwards convicted on the prosecution. (*d*), but also because "no man can say of an action still depending that it is false or malicious." (*e*) But the want of an averment that the original proceedings were determined will be cured by verdict (*f*) because it will be presumed that it has been proved at the trial. (*g*)

17. Qualifications of the general rule—The cases in which the entire determination of the previous suit out of which the action for malicious procedure has arisen need not be established as a prerequisite to the right to maintain, may be conveniently considered under several categories.

(*a*) *Where the cause of action is not dependent on the result of the former suit*—The first of these categories is defined by the exception implied in the remark of Blackburn, J., that "the termination demanded by the rule need not be a final determination of the cause of action, as in the case of a non-suit; but it must be final in so far as the suit or proceeding itself is concerned." (*a*) Hence if the declaration shew that the cause of action is dependent on the result of the former suit, it must shew the successful termination of such suit in favour of the plaintiff, as a condition precedent to the bringing of the action; but if the complaint disclosed be in no way dependent on the result of the former suit, and it is a well-grounded complaint, however the event may be,

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of an injunction still in force) from those in which the issuing of the process is the act of the moving party, but there seem to be no other authorities for this view.

(*d*) *Fisher* v. *Bristow* (1779) Dougl. 215. "If nothing was done upon the indictment, the plaintiff will clear himself too soon, i.e., before the fact tried, which will be inconvenient": *Arundell* v. *Tregino* (1608) Yelv. 116. To the same effect see *Lewis* v. *Farrel* (1719) 1 Str. 114.

(*e*) *Parker* v. *Langley* (1712) 10 Mod. 209. As regards the rule that it should appear on the face of the record that the prosecution was at an end, there is no difference between a malicious prosecution and a malicious commitment: *Morgan* v. *Hughes* (1788) 2 T.R. 225. The tracing of a writ of extent to its close is sufficiently accomplished by shewing its discharge by the court, though upon an arrangement and by consent: *Craig* v. *Hasell* (1843) 4 Q.B. 481.

(*f*) *Skinner* v. *Gunton*, 1 Wms. Saund. 228.

(*g*) Per Denison, J., in *Panton* v. *Marshall*, Q.B. Michaelmas, 28 Geo. II., cited in Selwyn's Nisi Prius (8th Ed.), p. 1070.

(*a*) *Parton* v. *Hill* (1864) 12 W.R. 753, per Blackburn, J.

the plaintiff may maintain his action without stating the determination of the first suit. (*b*)

Upon this principle it is obvious that in an action for maliciously and falsely holding to bail on the pretext that the party was leaving the country, the plaintiff may recover on proof of his discharge from arrest, though the debt really existed. (*c*). The Ontario Court of Appeal has held that in an action for maliciously holding to bail, the gravamen of the suit is the defendant's bad faith in procuring the judge's order, and upon this theory decided that the plaintiff is entitled to shew that the order was so procured without proving either that the order was rescinded, or that he was discharged from arrest (*d*).

(*b*). *Where the question is whether the procedure complained of was for the purpose of effecting something not within the scope of the suit*—A distinction is taken between the cases in which the act complained of was a process, "incident and auxillary to" the previous suit, and those in which it was not (*e*).

On the one hand an averment that the suit has been terminated is not necessary where the defendant is charged with having attempted to use the process of the court in order to effect something not properly within the scope of the suit, as where the action

(*b*) *Fahey* v. *Kennedy* (1869) 28 U.C.Q.B. 301, holding that it is not necessary to aver that the attachment of the debtor's person has been set aside, where the action is brought against one of the creditor's deponents for making a false affidavit that he believed that the plaintiff had departed from the country with intent to defraud such creditor. See also *Eakins* v. *Christopher* (1868) 18 U.C.C.P. 532.

(*c*) Wightman, J., in *Craig* v. *Hasell* (1843) 4 Q.B. 481 (p. 488).

(*d*) *Erickson* v. *Brand* (1888) 14 Ont. App. 614 (diss. Burton, J.A., on the ground that the proceedings were not ex parte, but that the judge in making the order acted judicially: see infra, sub-sec. (*c*). "The falsity of the creditor's affidavit," said Osler, J.A. (pp. 650, 651) "is not proved by the subsequent discharge of the debtor any more than its truth is affirmed by the discharge being refused or not applied for." . . . The granting or refusal of the charge does not decide the question involved in the action, viz., whether the defendant's affidavit fairly stated the facts on which he procured the judge to make the order, or suppressed material facts which should have been brought to his notice. "If the complaint," said Patterson, J.A. (p. 645), "concerns the debt sworn to, the rule applies. . . . Where, however, the complaint is respecting the facts asserted to lead to the inference that the defendant is about to quit the country with intent to defraud his creditors, the principle ceases to apply." [See also *Gilding* v. *Eyre*, cited in (*b*) infra.] Where the improper issue of a writ of extent is the grievance complained of, the inquisition and the finding therein are not a part of the proceedings in such a sense that the subsequent suit cannot be maintained while the finding remains in force: *Craig* v. *Hasell* (1843) 4 Q.B. 481.

(*e*) *Parton* v. *Hill* (1864) 12 W.R. 754.

is brought to recover for wrongfully putting the machinery of the law in motion for the ulterior purpose of extorting from the plaintiff property to which the defendant had no colour of title, the plaintiff being arrested for a debt not yet due, and held to bail, it is not necessary to prove either that the former suit is terminated or that it was instituted without reasonable or probable cause (*f*).

In an action for maliciously and without reasonable or probable cause suing out a ca. sa. upon a partially satisfied judgment, securing the detention of the plaintiff by indorsing it for a larger sum than was really due, the fact that the plaintiff fails to show on the face of his declaration that he had been discharged from custody by order of the Court or a judge does not render it bad, on the ground that such omission is inconsistent with a want of reasonable and probable cause, and shews that the former proceedings had not terminated in his favour. Willes, J., pointed out that the general rule as to the necessity of establishing such a termination could have no application to a case in which the complaint was not that any undetermined proceeding was unjustly instituted, but that the defendant had maliciously employed the process of the court in a terminated suit, in having, by means of a regular writ of execution, extorted money which he knew had been already paid, and was no longer due on the judgment. The whole force of the defendant's argument rested upon the assumption that the order of a court or judge for the plaintiff's discharge was the only means of legally determining the former proceedings, by ascertaining the illegality of the arrest complained of; whereas the true view of the matter was that this illegality altogether depended on the amount for which the arrest was made being greater than the sum due—a fact which could only be decided conclusively between the parties by the verdict of a jury. The question whether or not there was probable cause could not be affected by an order for the discharge of the plaintiff, for a court, although, on an application for a discharge from custody, it would look at affidavits of the facts for the purpose of informing its conscience in the exercise of its equitable jurisdiction, did not, by granting or refusing the order for a discharge, necessarily decide, or affect to decide, any disputed question of fact, so as to preclude the parties from having that fact subsequently ascertained by the verdict of a jury. (*g*) Compare *Erickson* v. *Brand*, cited in sub-sec. (a) supra.

On the other hand, the termination of the suit must be averred, where the proceeding is one taken regularly in the course of a suit for the purpose of effecting its very object, or where the defendant,

(*f*) *Grainger* v. *Hill* (1838) 4 Bing. N.C. 212.

(*g*) *Gilding* v. *Eyre* (1861) 10 C.B.N.S. 592.

upon an affidavit of claim, procured the issue of a writ attaching a debt due to the plaintiff. (*h*)

(*c*). *Materiality of the fact that the proceedings were or were not ex parte*—Both in the case of the exhibiting of articles of the peace and in the case of an application for sureties of the peace or recognizances for good behaviour, the charge is not susceptible of being controverted, and the accused has, therefore, no opportunity of getting a determination in his favour. The magistrates are bound to act upon the statement made to them, and do not exercise any judicial functions at all. Under such circumstances the ordinary rule is not applicable, that the plaintiff must allege and prove that the procedure which he alleges to have been maliciously taken terminated in his favour. (*i*)

The ex parte character of the proceedings, however, is not regarded as a decisive differentiating factor in all cases. "Under the old law," [i.e., as it prevailed in England prior to the abolition of arrest for debt on mesne process], "you could not," remarked Cockburn, C.J., in *Parton* v. *Hill* (*j*) during the argument of counsel, "have brought an action for maliciously holding to bail without alleging the termination of the action favourable to the plaintiff; yet that was an ex parte proceeding, and the affidavits could not be contradicted."

18. Action not maintainable, unless the previous suit was terminated in the plaintiff's favour—A pendant to the general rule that a party cannot sue for a malicious arrest or prosecution without shewing in his declaration that the proceeding complained of was terminated, is that the action does not lie unless the termination

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(*h*) *Parton* v. *Hill* (1864) 12 W.R. 753 (see especially the opinion of Blackburn, J.)

(*i*) *Steward* v. *Grommett* (1859) 7 C.B.N.S. 191. Compare remarks of Blackburn, J., in *Parton* v. *Hill* (1864) 12 W.R. 753. So, also, one of the grounds upon which the majority of the court in *Erickson* v. *Brand*, sub-sec. (a), supra, decided in favour of the right of action, and the only ground upon which, as noted, Barton, J, dissented, was that the arrest was, ex parte, not directly controvertible as a part of the same proceeding. In order to enable the plaintiff to maintain an action for maliciously and without probable cause suing out a writ of extent after he had been found by an ex parte inquisition to be indebted to the Crown, all that the law requires is that the writ of extent should be traced to its close, as by a supersedeas. The fact that the declaration shews that the verdict of the jury and the inquisition remain still unreversed and in full force does not necessarily negative the want of reasonable and probable cause, or forbid the court to infer the existence of malice: *Craig* v. *Hassell* (1843) 4 Q.B. 481.

(*j*) (1864) 12 W.R. 753.

is such as to furnish prima facie evidence that the proceeding was without foundation. (*a*) Since, therefore, both upon principle and authority, an essential ground of the action on the plaintiff's side is his innocence, (*b*) an unreversed conviction is conclusive evidence of the existence of probable cause. (*c*)

There is high authority for the doctrine that even a judgment of a tribunal which fixes the guilt of the accused until a higher tribunal has declared him to be innocent, is a bar to an action, for the Court of Exchequer Chamber has held that a declaration which charged that the defendant maliciously exhibited an information against the plaintiff before the sub-commissioners of excise for a violation of the excise laws, that the sub-commissioner condemned the property described in the information, and that the commissioners ordered the property to be restored to the plaintiff, was "felo de se," as the sub-commissioner's condemnation showed of itself a foundation for the prosecution, and this result was not altered by the judgment of reversal. (*d*) But this decision would seem, in view of the more modern authorities, more especially those relating to the effect of a commitment by a magistrate—sec. 20 (*a*) post—to ascribe an undue weight to the action of a merely quasi-judicial body, having, as may be assumed, no special qualifications which would justify placing them in the same category as the expert lawyers who preside over the superior courts.

The fact that the plaintiff was absolved merely by a pardon implies, it is evident, that he had previously been convicted after a regular trial. Proof of that fact, therefore, like proof of conviction merely, conclusively establishes the existence of probable cause. (*e*)

19. Specific results of previous proceedings, inferences from — (*a*) *Acquittal in previous trial* — The general principle that "it is not enough for the plaintiff to shew, in order to support the claim which he has made, that he was innocent of the charge upon which he was tried, and that he has to shew that the prosecution was instituted against him by the defendant without any reasonable or probable cause, and not with the mere

(*a*) *Wilkinson* v. *Howell* (1830) Moo. & Malk. 495, per Lord Tenterden.

(*b*) *Jones* v. *Givin* (1712) Gilbert's K.B. 185.

(*c*) *Mellor* v. *Baddeley* (1834) 2 Cr. & M. 675; *Kenahan* v. *Geriken* (1878) 1 L.C. Leg. News (S.C.) 267. In *Parton* v. *Hill* (1864) 12 W.R. 753, it was contended that a termination of the original suit in the plaintiff's favour was sufficiently shown by the removal of the attachment upon the plaintiff's paying the money, but Blackburn, J., remarked that such payment rather showed a determination in favour of the defendant than of the plaintiff.

(*d*) *Reynolds* v. *Kennedy* (Exch. Ch. 1748) 1 Wils. 232 [discussed, however, with more especial reference to the existence of malice, which, it was said, was not conclusively shown by the reversal].

(*e*) *Jones* v. *Givin* (1712) Gilb. K.B. 185 (p. 215).

intention of carrying the law into effect, but with an intention which was wrongful in point of fact," (*a*) clearly involves the corollary that the fact of the plaintiff's having been acquitted in the previous trial is not conclusive as to the absence of probable cause. (*b*) It has been pointed out that this must be the correct principle, for this, if for no other reason,—that the presence of probable cause would not be enough to justify a conviction. (*c*)

(*b*) *Ignoring of bill by grand jury*—Analogous to the principle laid down in the last sub-section is that by which the ignoring of the bill by the grand jury is regarded as inconclusive evidence of the want of probable cause. (*d*) Hence, where the plaintiff merely shews that the grand jury threw out the bill, he should be nonsuited. (*e*)

(*c*) *Termination in plaintiff's favour on purely technical grounds*—The fact that the previous proceedings terminated in the plaintiff's favour is no evidence whatever of the want of probable cause, where such termination was not on the merits, but on purely legal and technical grounds; as, for instance, on account of a defect in the indictment, (*f*) or where the crime charged is one which can only be committed where the prosecutor and the accused occupy certain legal relations to each other, and those relations were not proved to have existed. (*g*)

As a supersedeas may proceed upon strictly legal grounds, it is not conclusive proof of want of probable cause for serving out a commission of bankruptcy. (*h*)

(*a*) *Abrath* v. *North Eastern R. Co.* (1883) 11 Q.B.D. 440, per Brett, M.R.: *Sherwood* v. *O'Reily* (1846) 3 U.C.Q.B. 4: *Joint* v. *Thompson* (1867) 26 U.C.Q.B. 519.

(*b*) *Lows* v. *Telford* (H.L.E. 1876) 1 A.C. 414. In an early case the court acted on the theory that probable cause for a prosecution is established where it appears that the jury before acquitting the plaintiff, deliberated for a short time, even though he was not obliged to call any witnesses in his own behalf: *Smith* v. *Macdonald* (1799) 3 Esp. 7.

(*c*) *Pinsonnault* v. *Lebastien* (1887) 31 L. Can. Jur. (Cour de Rev.) 167.

(*d*) *Cartier* v. *Rolland* (1887) 32 L.C. Jur. (Q.B.) 31.

(*e*) *Byrne* v. *Moore* (1813) 5. Taunt. 187: See, however, contra, *McCreary* v. *Bettis* (1864) 14 U.C.C.P. 95, and the remarks made, arguendo, by Holroyd, J., in *Nicholson* v. *Coghill* (1825) 4 B. & C. 21 that such action is sufficient to warrant an inference of want of probable cause. But it is difficult to see how such statements can be brought into harmony with the undisputed doctrine as to the inconclusive effect of an acquittal. An endorsement upon the bill in these words: "The Grand Jury recommended no bill," amounts to an ignoring of the bill, and if it is so treated, and no further proceedings are taken, the prosecution is terminated: *Alward* v. *Sharp* (1868) 1 Hannay (N.B.) 286.

(*f*) *Wicks* v. *Fenthon* (1791) 4 T.R. 247 [In an indictment for permitting escape of prisoner, the headborough was misdescribed as constable].

(*g*) In *Edwards* v. *Annett* (1885) 3 Times L.R. 671, the plaintiff had been tried on a charge of embezzlement, and acquitted on the technical ground that he was not a servant of the defendant. Grove, J., told the jury that the plaintiff had the burden of proving that the defendant instituted the proceedings without reasonable and probable cause, and the jury returned a verdict for the defendant.

(*h*) *Hay* v. *Weakly* (1832) 5 C. & P. 361, per Tindall, C.J., comparing the cases of an acquittal and a nonsuit.

(*d*) *Nonsuit*—If the first actions go off by nonsuit, it is evident that, in another action brought for the same cause, there may be a verdict rendered inconsistent with that given in the action for malicious prosecution. But it has long been settled that the possibility of such a verdict in a future and not existing action shall not hinder a man from bringing the second action. (*i*)

(*e*) *Abandonment of previous proceedings*—It has been laid down that the fact of the prosecution being abandoned before the trial does not relieve the plaintiff in the second action from the burden of proving want of probable cause; (*j*) that an action for malicious prosecution cannot be supported merely by evidence of the abandonment of an action of debt after the arrest of the plaintiff; (*k*) and that the existence of probable cause is not absolutely negatived by evidence showing that the defendant discontinued an action of debt after the arrest of the plaintiff. (*l*) But in later cases a different doctrine seems to be enunciated. Thus, evidence that an action for debt was discontinued by the defendant about three weeks after the commencement of the proceedings and the arrest of the plaintiff, has been held sufficient to cast upon the defendant the onus of proving a probable cause for the arrest. The position taken was that, as the ground of the discontinuance is peculiarly within the knowledge of the defendant, it is for him to offer an explanation, if he has one. (*m*) So also, Lord Tenterden laid it down a few years later, that, in deciding the questions of malice and want of probable cause, it makes a material difference whether the plaintiff or prosecutor terminated the previous proceedings by merely letting them drop and allowing a nolle prosequi or a nonsuit to be entered, or whether he discontinued them, the latter being a termination by his own act. (*n*) So also it has been said that a stet processus, by consent of the parties, so far from being evidence that the suit in which an arrest was made was without probable cause, is prima facie evidence the other way. (*o*)

(*i*) Parker, C.J., in *Parker* v. *Langley* (1712) 10 Mod. 209.

(*j*) *Purcel* v. *McNamara* (1808) 1 Camph. 199 (and cases cited on reporters' notes). There the plaintiff rested his case after proving the dropping of the prosecution, and was nonsuited, Lord Ellenborough remarking that "the abandoning of a prosecution may arise from the most honourable motives, and the nicest sense of justice, instead of necessarily proving that the prosecution was wantonly and maliciously instituted, and the facts which justified the prosecutor's conduct may be known only to himself. A rule for a new trial in this case was refused by the King's Bench; see 9 East 361.

(*k*) *Sinclair* v. *Eldred* (1811) 4 Taunt. 7.

(*l*) *Bristow* v. *Heywood* (1815) 1 Stark 48.

(*m*) *Nicholson* v. *Coghill* (1825) 4 B. & C. 21.

(*n*) *Webb* v. *Hill* (1828) Moo. & M. 253.

(*o*) *Norrish* v. *Richards* (1835) 3 Ad. & E. 733, per Patteson, J. (p. 737), citing *Wilkinson* v. *Howell* (1830) Moo. & M. 495.

(*f*) *Discharge by magistrate* [*compare sec. 20* (a) *post ante*]—A dismissal of a charge by a magistrate is not of itself proof of want of reasonable and probable cause for bringing that charge. (*p*) Still less will the fact that the complaint was dismissed by the magistrate merely on account of a defect of jurisdiction, enable the plaintiff to maintain the action, where the absence of authority was not absolute, but arose merely from an error as to the local extent of the jurisdiction. (*q*)

VI. EVIDENCE ADMISSIBLE TO ESTABLISH OR NEGATIVE EXISTENCE OF PROBABLE CAUSE.

[In this subdivision we shall state the effect of those rulings only which are of universal application, irrespective of the nature of the proceedings complained of. The admissibility of evidence for the purpose of establishing or negativing probable cause in particular cases has been already reviewed, as a part of the foregoing discussion, under the appropriate headings].

20. Opinions formed by others as to the justifiability of the previous proceedings, materiality of—(*a*) *Opinion of judge or magistrate, how far a protection*—Upon the question whether the decision of a superior judge or of a court, or of both, that an indictment will lie, as a matter of law, or that a man may be adjudicated a bankrupt, there was a conflict of opinion in *Johnson* v. *Emerson*, (*a*). Kelly, C.B., and Cleasby, B., considered (p. 393) that such a decision is not necessarily conclusive evidence that one who had before preferred the indictment, or petitioned for the adjudication, had reasonable and probable cause for the act he did, and that it is evidence only so far as it may tend to satisfy a jury that what the judge and the court held to be law, the prosecutor or petitioner bona fide believed to be the law. There still, it was said, remained the alternative that, assuming it to be not the law, the prosecutor or petitioner knew or believed it was not the law. The moment this was shewn, there was, it was said, no probable cause. Martin and

(*p*) *Henderson* v. *Midland* R. Co. (1871) 20 W.R. 23: *Barbour* v. *Gettings* (1867) 26 U.C.Q.B. 544. An allegation in a complaint against a magistrate for maliciously committing the plaintiff to prison is demurrable where it merely states that the plaintiff was "discharged," unless the discharge was in consequence of the grand jury's not finding the bill: *Morgan* v. *Hughes* (1788) 2 T.R. 225: So held also, where the charge was one of assault, in spite of the fact that the ground of dismissal was that the complainant, according to the weight of the evidence, had commenced the disturbance and by his conduct provoked the assault: *Raymond* v. *Biden* (1892) 24 Nov. Sc. 363.

(*q*) *Copeland* v. *Leclerc* (1886) 2 Montr. L. R. (Q.B.) 365.

(*a*) (1871) L. R. 6 Exch. 329.

Bramwell, BB., took the opposite view ; (*b*) and this, it would seem, must be the correct one, wherever, at least, the judge is placed in possession of all the facts upon which his opinion is to be formed. A theory of evidence which is based upon the very improbable, though not wholly impossible, contingency that the *simplicatas laicorum* may arrive at a sounder conclusion as to the purely legal significance of evidence than the trained intellect of a professional jurist savours somewhat too strongly of over-refinement to find a place in a practical science like the law.

In estimating the value of the opinion of a magistrate as evidence of probable cause, it must be theoretically proper to consider whether the opinion represents a conclusion as to a matter of law, or a mere inference that certain acts were done by the person brought before him, and also whether he was a trained lawyer or a layman. But the courts have not attempted to make these alternatives the basis of any very precise differentiation. We find it laid down, however, that, where the justifiabilty of the proceedings depends upon whether the accused did something which, if established by adequate proof, indisputably constitutes the offence charged, the fact that a judge or magistrate had spontaneously bound over the defendant to prosecute would go very far to show that the prosecution was a proper one (*c*). So also the fact that a magistrate, supposed to be sufficiently learned in the law to decide officially as to the nature of a complaint made before him, issued a warrant upon a true statement of facts really inadequate to justify arrest, is very strong evidence in favour of the plaintiff, who may well be supposed to have acted on the advice of the magistrate ; though it would probably be still a question for the jury whether the defendant, influenced by the decision of the magistrate, had innocently pursued his opponent

(*b*) See also the opinion of Cockburn, C.J., stated in the next note.

(*c*) *Fitzjohn* v. *Mackinder* (Exch. Ch. 861) 9 C.B.N.S. 505, per Cockburn, C.J.: *Pinsonnault* v. *Sebastien* (1887) 31 L. C. Jur. (Cour. de Rev.) 167. In Massachusetts the advice of a magistrate who is not a member of the legal profession is not available as a defence any more than the advice of laymen, the principle laid down being that "the law requires that a person who has instituted a groundless suit against another should show that he acted on the advice of a person who by his professional training and experience, and as an officer of the court, may be reasonably supposed to be competent to give safe and prudent counsel on which a party may act honestly and in good faith, although to the injury of another": *Olmstead* v. *Partridge* (1860) 82 Mass. 381. To the same effect see *Probst* v. *Ruff* (1882) 100 Pa. St. 91.

by criminal process, or was himself aware that the complaint did not warrant such process. (*d*)

In 1842 the observations of the judge on the trial of the indictment, tending to cast censure on the mode in which the prosecution had been conducted, were admitted by Littledale, J., in favour of the plaintiff. (*e*) This ruling was followed six years afterwards, as regards the observations of the magistrate in dismissing the charge. (*f*) But in 1841, it was declared that the observations of the judge on the former trial are not admissible against the defendant in the action for malicious prosecution, (*g*) and a similar view was enunciated on the most recent English case in which, so far as we have ascertained, the point has arisen, Mellor, J., being of opinion that the remarks made by the magistrate on the plaintiff's discharge are not competent evidence in the plaintiff's behalf, since, if they are unfavorable to him he has no means of replying to them. (*h*)

The conflict of opinion thus disclosed is embarrassing, but the doctrine which declares such evidence to be admissible is, it is submitted, the correct one. The essential question in actions of this kind is assumed in all the decisions to be this: What inferences would a man of ordinary intelligence have drawn as to the plaintiff's guilt from the information which he had, or ought to have had, in his possession when he instituted the proceedings, and it seems to be inconsistent with principle to exclude entirely evidence going to shew the judgment formed by one who has such exceptional opportunities for arriving at a just conclusion as a trial judge or a magistrate. The rights of the parties in the second action would, we think, be quite sufficiently safeguarded if the jury were expressly cautioned against ascribing undue weight to such evidence. In Canada the drift of judicial opinion seems to be decidedly in the direction of sustaining its admissibility. (*i*)

(*d*) *McNellis* v. *Gartshore* (1853) 2 U.C.C.P. 464.

(*e*) *Warne* v. *Terry* (1836), cited in Roscoe Nisi Pr. Ev. p. 886.

(*f*) *Edden* v. *Thorniloe* (1842) 6 Jur. 264.

(*g*) *Barker* v. *Augeil* (1841) 2 Moo. & Rob. 371, per Lord Denman.

(*h*) *Welslar* v. *Zachariah* (1867) 16 L.T.N.S. 432, per Mellor, J.

(*i*) Thus it has been held that a statement of the justice who issued the warrant that the defendant told him all the circumstances, and appeared to be acting in good faith, is evidence going more to rebut malice than to establish the existence of probable cause, but that it is not to be overlooked when the only fact to show the want of probable cause was that the charge was, upon investigation, dismissed by the magistrates: *Barbour* v. *Gettings* (1867) 26 U.C. Q.B. 544. In *Rice* v. *Saunders* (1876) 27 U.C.C.P. 27 also, the court were to some extent influenced by the fact that after the acquittal of the plaintiff, the trial judge had recorded upon the indictment his opinion that there was probable cause for the prosecution.

(*b*) *Opinion of jury on previous trial*—As the inquiry in an action for malicious prosecution and the investigation on the trial of the criminal charge are not *ad idem*, an expression of opinion by the jury which acquitted the plaintiff that the evidence before them was insufficient, or the charge malicious, is not admissible in behalf of the plaintiff in his suit for damages. *Non constat*, but that the defendant may then be in a position to adduce evidence of reasonable and probable cause, which was not laid before the other jury. (*j*) So a verdict for the party who was defendant in the original action, and between the time when the plaintiff in the second action was arrested on a charge of being about to leave the country and the time when the latter action was tried, is not admissible in the second action for the purpose of shewing want of probable cause. (*k*)

(*b*) *Opinion of members of the legal profession, how far a protection*—The materiality of the fact that the defendant consulted or omitted to consult a professional adviser should, properly speaking, be decided with reference to the consideration that the use of legal process wears a completely different aspect according as the disputable point upon which the existence of probable cause depends is one of law or of fact,—one which only a person who has a legal education is competent to determine, or one upon which any person of reasonable intelligence is capable of forming a sound judgment.

In the former case, upon a principle analogous to that noticed in the sub-section (a), supra, seems to justify the conclusion that if the justifiability of a suit turns upon a question of law, the opinion of a barrister would, except, perhaps, under the extraordinary circumstances there referred to, furnish a complete defence to the action. Thus, where the questions upon which the justifiability of an arrest depends are whether a foreign government is bound by the contracts of its agent, and whether such agent is personally liable, a bona fide belief, founded upon the opinion of counsel, that a party has a good cause of action when, in fact, he has none, is sufficient to shew that he had a probable cause of action. (*l*)

(*j*) *Hibberd* v. *Charles* (1860) 2 F. & F. 126, per Keating, J.

(*k*) *Daly* v. *Leamy* (1856) 5 U.C.C.P. 374.

(*l*) *Ravenga* v. *Mackintosh* (1824) 2 B. & C. 693, per Bayley, J.,—Holroyd, J., declining to pronounce an opinion on this point. Compare *Martin* v. *Hutchinson*

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.

examine into the whole case, in its evidential as well as in its legal aspects. The protective value of his opinion, then, seems to depend not so much upon his professional character as upon the fact that the investigation was carefully and thoroughly carried out by a person to whom his client was warranted in delegating his own duty in that regard. Thus, it was laid down by Brett, M.R., in a leading case, that, where the question is whether the defendant was reasonably careful in the investigation which preceded the prosecution, the facts that a solicitor was employed, witnesses examined, and the opinion of counsel taken, are conclusive in defendant's favour. (*o*)

A distinction is also taken between a case where the defendant took the proceedings in person and a case where they were instituted at a distance by someone in his behalf. Thus, it has been held that there is not an absence of reasonable cause for a principal's allowing a prosecution to proceed so far as the hearing of the summons, and attending the hearing himself, where the summons was issued without his knowledge, and they knew nothing of the circumstances except that the charge had been instituted by his agent, with the advice of attorneys. (*p*)

(*c*) *Professional advice not a protection, unless based upon full statement of facts*—To secure such protection as the opinion of counsel affords, it is of course necessary for the defendant to shew that the statement of the case with reference to which the advice was given, was a correct and honest presentment of all the facts, so far as they were known to him. (*q*)

(*o*) *Abrath* v. *North Eastern R. Co.*, (1883) 11 Q.B.D. 440; see per Brett, M. R. p. 455 So also it has been held that a judge should nonsuit the plaintiff where he was prosecuted on a charge of embezzling money received by him for the defendant, after the defendant's solicitor, upon a careful examination into the truth of the statement of a passenger by whom he had been accused of having received double the amount for which he had given a receipt, had come to the conclusion that the charge was well-founded: *Kelly* v. *Midland* &c., R. Co. (1872) Ir. Rep. 7 C.L. 8.

(*p*) *Weston* v. *Beeman* (1857) 27 L.J. Exch. 57,

(*q*) *Hewlett* v. *Cruchley* (1813) 5 Taunt. 277: *Larocque* v. *Willett* (1874) 23 L. C. Jur. (Q.B.) 184, per Taschereau, J. (p. 188): *Fellowes* v. *Hutchinson* (1855) 12 U.C.Q.B. 633: *Wilson* v. *Winnipeg* (1887) 4 Man. L.R. 193: *McGill* v. *Walton* (1888) 15 Ont. R. 389 [advice of magistrate]. In *Millner* v. *Sanford* (1893) 25 Nov. Sc. 227, Wetherbe, J., considered that a charge to the effect that the prosecution was not justified if the defendant "had not fully stated everything to his counsel, when he advised a prosecution" tended to mislead the jury, where there was no suggestion that he had concealed anything. Whether the omission to disclose something could be fatal to the defendant's case depended, he said, on its materiality and upon the question of his motives.

21. Opinions of non-professional persons, how far a protection—It is obvious that the opinion of a non-expert upon the justifiability of instituting a legal proceeding is precisely of the same weight, neither more nor less, than the opinion of the plaintiff himself, supposing him to be a layman. Hence evidence going merely to prove that one or more persons, not members of the legal profession, told the defendant that they thought she would be justified in arresting a debtor suspected of an intention of absconding, will not enable a judge to rule absolutely in the defendant's favour on the question of probable cause. (*r*)

22. Previous occurrences, how far suspicions of defendant are justified by—Although one felony cannot be proved by another, yet if it appears at the time that the party who is charged has been a thief with respect to other articles, that affords some evidence of reasonable and probable cause for suspecting that he has been a thief with respect to the article to which the charge refers. (*a*) Thus there is probable cause for laying a charge of theft against an employé who had charge of his master's effects and had access to the desk from which the property was taken, and property had been stolen twice before from the same desk. (*aa*) So, where suspicion of one piece of property has, upon certain evidence, been already excited against a servant, the fact that, upon having a search made, his master finds in the servant's box another piece of property which he supposes to be stolen, though it afterwards turns out to have been presented to the servant by the master himself, may be taken into consideration in deciding whether there was reasonable and probable cause for giving the plaintiff into custody on a charge of stealing the first-named property. (*b*) So, also, there is reasonable cause for causing the plaintiff to be arrested, where the defendant had his barn burnt under circumstances which produced a general impression in the neighborhood that it was the work of an incendiary, and which led many to believe that the plaintiff was the guilty party, especially where there is the additional circumstance that he had removed just before the fire a quantity of straw which had been lying near his barn. (*c*) But in an action for the false imprisonment of the plaintiff on a charge of receiving oysters stolen from the defendant's bed, the record of the previous conviction of a third person on a charge of stealing oysters from the same bed is not admissible as evidence to shew that the defendant acted bona fide and under a

(*r*) *Thorne* v. *Mason* (1851) 8 U.C.Q.B. 236.

(*a*) *Wilkinson* v. *Foote* (1856) 5 W.R. 22, per Martin, B.

(*aa*) *Broughton* v. *Jackson* (1852) 18 Q.B. 378.

(*b*) *Wilkinson* v. *Foote* (1856) 5 W.R. 22.

(*c*) *Wilson* v. *Lee* (1853) 11 U.C.Q.B. 91.

reasonable belief that plaintiff had stolen oysters in his possession. (*d*) So, also, it is unjustifiable to arrest, without inquiry, two young boys on a charge of arson, merely because they had been seen in the building burnt (a vacant one) about seven hours before the fire was discovered. (*e*)

23. Bad character of party prosecuted, how far admissable as evidence of probable cause—The weight of authority seems to be against the right of the defendant to introduce evidence tending to prove the bad character of the plaintiff. (*a*)

24. Miscellaneous - In an action for arresting without a reasonable and probable cause, whatever facts were admissible in evidence to defeat the original action are also admissible in the second action as bearing upon the right to make arrest. (*a*)

Where the various facts alleged in the defendant's plea of justification are all proved except that a certain conversation stated to be had with A. was shewn to have been really had with B., it is error to tell the jury that they must exclude from their consideration the fact of the alleged conversation. This evidence is at all events admissible to shew that the defendant acted bona fide. (*b*)

A defendant cannot give evidence of collateral matters to shew what was passing in his mind, in order to prove that he had reasonable and probable cause for giving a man into custody. The evidence must be confined to matters contained in the issue. (*c*)

In an action for false imprisonment on a charge of attempting to defraud the defendant by the forgery of D.'s acceptance of a bill, then in possession of the plaintiff, where one of the plaintiff's witnesses has testified

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(*d*) *Thomas* v. *Russell* (1854) 9 Exch. 764.

(*e*) *Gowan* v. *Holland* (1896) 11 Que. Off. R. (S.C.) 75.

(*a*) In the earliest case on the subject it was held that a witness may be asked whether the plaintiff was not a man of notoriously bad character: *Rodriguez* v. *Tadmire* (1799) 2 Esp. 721. In *Newsam* v. *Carr* (1817) 2 Stark 69 (action for procuring arrest on a charge of larceny) Wood, B., refused to admit evidence as to the bad character of the plaintiff, remarking that in actions for slander such evidence was admissible for the purpose of mitigating damages, and not to bar the action, and that, in an action of malicious prosecution such evidence would afford no proof of probable cause to justify the defendant. In *Downing* v. *Butcher* (1841) 2 Moo. & R. 374, it was held by Gurney, B., after a consultation with the other judges of the Court of Exchequer, that, in action for trespass for false imprisonment the defendant cannot cross-examine as to the bad character of the plaintiff, or as to the previous charges against him.

(*a*) *Haddan* v. *Mills* (1831) 4 C. & P. 486 [Tindal, C.J., admitted evidence that the bill which had been accepted for the accommodation of the drawer by the party arrested had come into the creditor's hands when it was overdue, and that the arrest had been made after the creditor had received two bills in place of the original one, as a consideration for giving time to the debtor].

(*b*) *West* v. *Baxendale* (1850) 9 C.B. 141 [verdict for plaintiff set aside].

(*c*) *Wetzlar* v. *Zachariah* (1867) 16 L.T.N.S 432, per Mellor, J.

that the plaintiff and defendant had gone with him to D. on the day following that on which the latter had dishonoured the bill, and that D., on being reminded by the defendant that, when the bill was presented for payment, he had stated that the plaintiff had forged his acceptance, had neither admitted nor denied making that statement, it is competent for the defendant to introduce testimony that D. did make that statement in order to overcome the effect of the plaintiff's evidence, which was being calculated to lead the jury to believe that the defendant had referred to a merely fictitious conversation. (*d*)

The admission of testimony going directly to disprove the plaintiff's guilt is not a fatal error, where the judge in his charge cautions the jury against trying his guilt or innocence on the charge made. (*e*)

In an action against a magistrate for malicious conviction the question is not whether there was any actual ground for imputing the crime to the plaintiff, but whether, upon the hearing, there appeared to be none. The plaintiff, therefore, must be nonsuited unless he produces evidence of what passed before the magistrate at the time of making the conviction. (*f*).

(*d*) *Perkins* v. *Vaughan* (1842) 4 M. & G. 988, intimating also that such evidence would have been admissible, even if evidence of the second of the two conversations had not been given by the plaintiff.

(*e*) *Millner* v. *Sanford* (1893) 25 Nov. Sc. 227.

(*f*) *Barley* v. *Bethune* (1814) 5 Taunt. 580.

In an early number of the JOURNAL will be published a short supplement to the foregoing article, summarizing the effect of some additional rulings, which deal with certain technicalities of trial practice, so far as they concern the subject under discussion.

C. B. LABATT.

REPORTS AND NOTES OF CASES

Province of Ontario.

COURT OF APPEAL.

From Drainage Referee.] [Sept. 12.

IN RE TOWNSHIPS OF ROCHESTER AND MERSEA.

Drainage — Branch drains — Separate assessment — Amendment of engineer's report.

Where it is essential for the purpose of draining the area in question a drainage work may include such branch drains as may be necessary, and the main drain and branches may be repaired and enlarged in case of necessity under one joint scheme and joint assessment, a separate scheme and separate assessment for the main drain and for each branch not being necessary. Under s.-s. 3 of s. 89 of The Municipal Drainage Act, R.S.O., c. 226, the Drainage Referee has jurisdiction, with the consent of the engineer and upon evidence given to amend the engineer's report by charging against the townships in question for "injuring liability" assessment erroneously charged against them by the engineer for "outlet liability." Judgment of the Drainage Referee reversed

Mathew Wilson, Q.C., and *J. G. Kerr*, for appellants. *A. H. Clarke*, and *M. K. Cowan*, for respondents.

From Meredith, J.] [Sept. 20.

IN RE POWERS AND TOWNSHIP OF CHATHAM.

Municipal law — By-law — Public Schools Act.

An appeal by the Township of Chatham from the judgment of MEREDITH, J., 34 C.L.J. 632, 29 O.R. 571, was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 19th and 20th of September, 1899, and on the conclusion of the argument was dismissed with costs, the Court agreeing with the judgment in the Court below.

J. S. Fraser, for appellants. *Aylesworth*, Q.C., and *A. B. Carscallen*, for respondent.

HIGH COURT OF JUSTICE.

Street, J.] GOODERHAM *v.* MOORE. [July 14.

Sale of land—Purchase subject to mortgage—Right of indemnity—Claim on administrator—Service of notice—R.S.O. c. 139, s. 35.

A sale of land for $275 on which there was a mortgage for $1100, the

conveyance being by the ordinary short form deed, the only reference to the mortgage being in the covenant for quiet enjoyment, was, under the circumstances, held to have been a sale subject to the mortgage, against which the vendor was entitled by the purchaser to be indemnified; and the plaintiff having acquired an assignment of such right of indemnity he was entitled to enforce it against the purchasers. Before the commencement of an action against the purchasers, one of them died and on the plaintiff notifying the administrator of his claim, he was served with a notice, under section 35 of R.S.O., ch. 139, disputing it. An action was afterwards brought against such administrator, but, on it appearing that he was then dead, and that an administrator de bonis non had been appointed to such administrator, an order was obtained amending the writ by substituting as defendant such administrator de bonis non, upon whom the writ was served, such service being some six months after the service of the notice.

Held, that the proceedings against the defendant must be deemed to have commenced only on the service of the writ on him, and this being more than six months after the service of the notice, the plaintiff's action was barred.

Wallace Nesbitt, for plaintiff. *Bell*, for defendant, John Moore. *Pepler*, Q.C., *and J. McCarthy*, for defendant, Tingate.

Robertson, J.] SNIDER *v.* MCKELVIE. [July 14.

Medical practitioner—Agreement not to practice—Breach of—Right to damages and injunction.

By an agreement under seal, the defendant, a physician and surg[illegible] sold his medical practice in a village, with the good will thereof, to [illegible] plaintiff for $2100, and bound himself in the sum of $400 to be paid to the plaintiff in case he should set up or locate himself within the space of five years within a radius of five miles of the village.

Held, the plaintiff was entitled to damages for breach of the agreement and an injunction restraining him from further breaches.

W. M. Sinclair, for plaintiff. *Garrow*, Q.C., for defendant.

Divisional Court] WATSON *v.* HARRIS. [July 14.

Patent of invention—Subsequent patent—Improvement on first patent—Assignee of first patent—Rights of.

The defendant and another who had acquired a half interest in a patent for making fuel from garbage, etc., assigned to the plaintiff one third interest therein and all improvements and amendments thereto, it being also contemplated that the invention could and would be utilized for making gas. The defendant subsequently procured a patent for making

gas from such garbage, etc., the ingredients used in the production under the second patent being the same, or the equivalent of those used under the first patent, an alleged change therein being designed merely to enable the defendant to appear to employ different materials, while in substance and effect the same; his dealings also with the plaintiff, after he had procured the second patent, were on the footing that plaintiff was to have the same interest therein as in the first patent.

A claim by the plaintiff that he was entitled to the benefit of the second patent as an improvement within the meaning of the first patent, under the terms of the assignment, was upheld.

Welton, for appellants. *Smoke*, for the respondents.

MacMahon, J.] BANK OF HAMILTON *v.* IMPERIAL BANK. [July 15.

Banks and Banking—Alteration of cheque—Liability.

B. having $10.25 to his credit at the Bank of Hamilton drew a cheque for $5.00, which he presented at that bank and had it marked good. The cheque had no figures before the dollar mark, and on the line for the written amount the word "five" was written, there being a long space between it and the word "dollar." B. then altered the cheque by writing "500" after the dollar mark and the word "hundred" after the word five, and, taking the cheque so altered, deposited it at the Imperial Bank, and opened an account there, and got three cheques marked on that bank, namely, for $300, $150 and $50, drawing out the amount of the $150 cheque and negotiating the other two. The altered cheque of $500 was sent by the I. Bank to the Clearing House, and, under the system in vogue, it was charged against the Bank of H. On the following morning, on the Bank of H. discovering that no cheque for $500 had been debited to B.'s account, and that a forgery had been committed, immediately notified the I. Bank and demanded repayment of $495, being the difference between the $500.00 and the $5.00, which had been debited to B. Under the system in force, the forgery would not be discovered until the following morning, but, it was said, that under a different system it might have been discovered sooner.

Held, that the plaintiff was entitled to recover.

Osler, Q.C., for plaintiffs. *Lash*, Q.C., and *Kappele*, for defendants.

Meredith, C.J.] PLAXTON *v.* BARRIE LOAN CO. [July 15.

Distress—Abandonment—Mortgage—Arrears of interest—Seizure of goods—Incompleteness of inventory—Proviso for redemption—Extension of time for payment—Swearing appraisers after appraisement.

After a distress for arrears of interest under the clause therefor in a mortgage, the bailiff remaining in possession and having the key of the

premises, the fact of the mortgagor being allowed as a matter of grace to go in and out of the premises for the purpose of carrying on some work, does not constitute an abandonment of the distress.

Where the evidence in other respects is clear that there was a seizure under the distress warrant of all of the goods, the fact of an incompleteness in the inventory merely, due to the mortgagor's action in the matter, cannot of itself displace the true facts of the seizure.

Where the time for payment of mortgage money is extended by an agreement, the proviso for redemption is to be read as a new and then existing proviso, so as to justify a distress for non-payment thereunder.

Where by the terms of assignment of mortgage authority is given to distrain for arrears of interest, the assignee may properly distrain for such arrears.

The fact of swearing the appraisers after the making the appraisement is an irregularity, and is a ground for damages only, and does not render the distress and subsequent proceedings invalid. No such ground was set up in the pleadings here, and, even if it had been, it was held that only nominal damages would have been allowed.

The sale under a distress warrant, after notice of exercising the power of sale in the mortgage, and before the expiry of the period provided thereby, but, after an order had been obtained from a judge permitting the sale to take place under the distress warrant, is a valid one, and is not affected by R.S.O., c. 121, s. 31.

A claim for damages, by way of counter-claim, for excluding the mortgagor from the premises, was held to be not sustainable by reason of the mortgagee being entitled to possession on default while, in any event, the possession here was with the mortgagor's consent.

Rowell and *Plaxton* for plaintiff. *Pepler*, Q.C., and *McCarthy* for defendants.

Meredith, C.J.] RAE *v.* RAE. [July 16.

Alimony—Desertion—Offer to receive wife back—Bona fides.

In an action for alimony, on the ground of desertion, in order to give effect to the husband's offer and willingness to receive back his wife, the judge must be satisfied that it is made bona fide, and not merely set up to prevent the pronouncement of judgment against him. *Crothers* v. *Crothers*, 1 P. & D. 568 referred to.

Aylesworth, Q.C., for plaintiff. *C. J. Holman*, for defendants.

Street, J.] THOMPSON *v.* CITY OF TORONTO. [July 17.

Municipal corporations—Local improvements—Street—Repair of—R.S.O. c. 223, 62 Vict. (2) c. 26, 41 (O)—Applicants therefor—Status of.

To obtain an order under R.S.O. c. 223, as amended by s. 41 of 62 Vict. (2) c. 26 (O), for the repair of a pavement on a street which had been

laid down as a local improvement, the applicant must be a ratepayer of property abutting on the street and who has been assessed for the work in question.

Woods, for applicants. *Fullerton*, Q.C., for City of Toronto.

Meredith, C.J.] THOMPKINS *v.* BROCKVILLE RINK CO. [July 17.

Municipal corporations—By-laws prohibiting erection of wooden building—Right to maintain action for breach of.

Where a statute provides for the performance of a particular duty, and one of a class of persons for whose benefit and protection the duty is imposed is injured by the failure of the person required so to perform it, an action, prima facie, and if there is nothing to the contrary, is maintainable by such person; but not where the non-performance is, in the general interest, punishable by penalty. Where therefore, under authority conferred by s. 496 s.-s. 10 of the Municipal Act, a by-law was passed by council of a city, setting apart certain areas as fire limits where no wooden buildings could be erected, and that buildings erected in contravention therefore, might be pulled down and removed by the corporation at the cost of the owner, and a penalty of $50 imposed, the erection of a wooden building within such limits, does not give a right of action to the owner of contiguous property whose property is injuriously affected thereby, and an action, therefore, brought by such owner for the recovery of damages, and claiming the removal of such building and for an injunction, was dismissed with costs.

Aylesworth, Q.C. and *Brown*, for plaintiff. *Shepley*, Q.C. and *Buell*, for defendants.

Boyd, C.] IN RE ALEXANDER. [Sept. 1.

Jurisdiction — Divisional court—Appeal—Order—Surrogate judge—Compensation to executors.

Held, that an appeal lies to a Divisional Court under R.S.O. c. 59, s. 36, from an order of a Surrogate Court judge allowing compensation to an executor under the Trustee Act, R.S.O. c. 129, s 43.

The sections have become separated in the course of statutory consolidation and revision, but both are of one original (Surrogate Court Act 1858, secs. 20 and 47), and are still in pari materia, and are to be read together as forming one subject—matter. The Trustee Act does not make the Surrogate judge a persona designata from whom there is no appeal.

O'Connor, Q.C., and *Shepley*, Q.C., for the appeal. *C. J. Holman*, contra.

Meredith, C.J., Rose, J.] BROWN *v.* GRADY. [Sept. 5.

Infant—Mortgage—Covenant for payment—Approval of master—Mistake—Repudiation—Delay.

In taking a trustee's accounts before the Master it was found that there

was due to the trustee for compensation and costs a sum which was declared to form a lien on the trust estate. It was declared to be disastrous to sell the lands at that time, and the Master directed the trustee to mortgage them to pay off the lien. The defendant in this action was one of several cestuis que trust, and it was recited in the mortgage deed, which they executed, that they had agreed to join therein in order to vest all their interests in the mortgagee, but subject to the terms of the mortgage. The defendant was then an infant under nineteen years of age, but that fact did not appear on the face of the instrument, to which she was made to covenant for payment of the mortgage money. The instrument was marked "approved" by the Master, but not by the official guardian. It was stated, however, at the bar that the latter did approve, and that some pencil marks on the instrument signified his approval. No order was shown requiring execution by the infant. Nearly two years after the defendant came of age she was served with the writ of summons in an action by the mortgagee upon the covenant for payment, and, as she did not appear, judgment was signed against her. Two years later she moved to have the judgment set aside.

Held, by BOYD, C., and affirmed by the court, that the circumstances justified the mortgage, but not the personal covenant of the infant; it was contrary to all proper practice to have such a covenant on the part of an infant; and its presence was only to be explained by supposing that the Master's attention had not been called to the fact of infancy.

The covenant was void, as the infant had received no benefit from it and had been induced to enter into it per incuriam; and the delay was not material—the applicant being ignorant of her rights and not called on to disaffirm what was from the outset to her prejudice.

F. E. Hodgins, for the plaintiff. *J. R. Roaf*, for the defendant.

Meredith, C.J., Rose, J.] [Sept. 6.

IN RE ROSEDALE PRESSED BRICK AND TERRA COTTA CO.

FOSTER'S CASE.

Company — Contributory — Subscription before incorporation — subsequent allotment — Continuing offer.

Appeal by the liquidator of the company from the Master in Ordinary dismissing an application by the liquidator to settle the name of Edward H. Foster upon the list of contributories of the company in respect of ten shares. The alleged contributory signed the stock-book before the incorporation of the company, and the shares were allotted to him after the incorporation. There was, however, no proof of formal notice of allotment, though there was a correspondence between the alleged contributory and the secretary of the company, in which the latter insisted that the former was a shareholder.

The Master held, following *Tilsonburg Mfg. Co.* v. *Goodrich*, 8 O.R. 565, that subscription before incorporation was of no avail unless there was a subsequent ratification and there was none such here, and the alleged contributory was not a shareholder by estoppel.

Aylesworth, Q.C., for the appellant, contended that the subscription was a continuing offer to take shares, and when it was accepted after incorporation it became a contract. *Allan Cassels*, for the alleged contributory, contra.

The court was unable to distinguish this case from the *Tilsonburg Case*, and therefore dismissed the appeal with costs.

Meredith, C.J., Rose, J.] HOFFMAN *v.* CRERAR. [Sept. 7.

Judgment—Default—Writ of summons—Special indorsement—Nullity—Abandonment of action—Joint contractors—Release of some after judgment—Effect of—Costs.

Upon an appeal by the plaintiff from the order of ARMOUR, C.J., 18 P.R. 473, reversing an order of the local judge at Stratford, and staying proceedings upon judgments recovered and executions issued against certain of the defendants, counsel for the latter offered to pay the plaintiff such amount as, with the sums already paid, would make $116, for which judgment was recovered. The Court, in view of this offer, affirmed the order of ARMOUR, C.J., upon the ground that the plaintiff could not recover more than $116, but directed that the order should be so framed as to make it plain that the plaintiff was entitled to proceed for costs.

D. L. McCarthy, for the plaintiff. *J. H. Moss*, for the defendants.

Armour, C.J., Falconbridge, J., Street, J.] [Sept. 11.

IN RE CONFEDERATION LIFE ASSOCIATION AND CORDINGLY.

Interpleader—Summary application—Rule 1103 (a) Insurance moneys—Adverse claims—Foreign claimants—Notice of motion—Service out of jurisdiction—Rule 162 (b).

Certain moneys were payable by an insurance company under several life policies in favour of the assured, his executors, administrators or assigns. The moneys were claimed by the executors, who reside in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in the High Court for a summary interpleader order.

Held, reversing the decision of MEREDITH, C.J., ante, that they were not entitled to avail themselves of the provisions of Rule 1103 (a), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons, because no action was brought or threatened within Ontario, and the claimants would not be bound by any order that might be made; and therefore service out of Ontario of the company's notice of motion for the interpleader order should not have been allowed under Rule 162 (b) or otherwise.

Maclaren, Q.C., for Sarah E. Langridge. *Snow*, for the Association.

Armour, C.J., Street, J.] [Sept. 26

IN RE YOUNG AND TOWNSHIP OF BINBROOK.

Municipal corporations—By-laws—Voters' lists—Omission of classes of voters—Irregularity—Saving clause.

A by-law prohibiting the sale of intoxicating liquor in the township, under the provisions of s. 141 of R.S.O. c. 245, was submitted to the vote required by that section, and a majority of 98 votes appeared in its favour. Upon motion to quash the by-law it was objected that the names of some 80 persons entitled to vote were omitted from the lists furnished to the deputy returning officers, and that these persons had no opportunity of voting. The clerk who prepared the lists was under the impression that only those persons were entitled to vote who would be entitled to vote upon money by-laws, and he therefore left out all farmers' sons and income voters. The number of persons entitled to vote at municipal elections was , of whom 78 were farmers' sons and 2 income voters, the remainder being owners and tenants. Only 409 names appeared on the lists given to the deputies; 272 persons actually voted, 185 for the by law and 87 against it.

Held, following *In re Croft and Township of Peterborough*, 17 A.R. 21, and *In re Bounder and Village of Winchester*, 19 A.R. 684, that the names of the farmers' sons and income voters were improperly omitted from the lists.

Held, however, that the omission was not so serious an irregularity as to require that the court should quash the by-law.

Under s. 204 of the Municipal Act the by-law must stand if it should appear to the court "that the election was conducted in accordance with the principles laid down in the Act," and that the irregularity did not affect the result.

An election should be held to have been conducted in accordance with the principles laid down in the Act, when the directions of the Act have not been intentionally violated, and when there is no ground for believing that the unintentional violation has affected the result; and that was the state of things presented in this case.

The court was bound to assume that all the persons left off the list would have voted against the by-law; but it was not bound to assume that the error had any effect upon the minds of the persons upon the lists who voted or abstained from voting, in the absence of any evidence to shew that such was the case; and, adding the 80 votes to the 87, there was still a majority in favour of the by-law. *Woodward* v. *Sarsons*, L.R. 10 C.P. 733, followed.

Haverson, for Robert Young. *J. J. Maclaren*, Q.C., and *E. F. Lazier*, for township corporation.