

Full Court.] [Sept. 5.
FERGUSON, J.]
ROBERTSON, J.]

MARTIN v. HUTCHINSON.

Action for malicious prosecution—Clandestine removal of goods by tenants—Reasonable and probable cause—11 Geo. 2, c. 19—Counsel's advice.

In an action for malicious prosecution, the jury having found upon facts in dispute, the question of reasonable and probable cause is for the judge.

Where there has been a clandestine removal of goods by a tenant, a landlord cannot prosecute for such removal under 11 Geo. 2, c. 19, unless the goods were the goods of the tenant; neither can goods which are not the tenant's be distrained off the premises.

Where a prosecutor has *bona fide* taken and acted upon the opinion of counsel in the proceedings taken by him, this is itself evidence to prove reasonable and probable cause.

Per ROBERTSON, J. The defendant should satisfy the jury that he himself did not of his own knowledge know the law on the point, and that he was relying entirely upon counsel's advice.

McCullough for the plaintiff.

Reeve, Q.C., for the defendant.

Div'l. Court.] [Sept. 5.

BAIN v. AETNA LIFE INSURANCE CO.

Insurance—Divisible surplus—Divisible profits—Discretion of directors of company to retain profits to provide for contingencies.

On an appeal to the Divisional Court, the judgment of FALCONBRIDGE, J., reported, was affirmed.

Per BOYD, C. The representation made that participating policies "would receive their equitable share of the divisible surplus" points to the exercise of the discretion of the managers of the company; and the expression "divisible surplus" is one that refers to something less than the entire profits claimed by the plaintiff. Before divisible profits can be ascertained, it would seem to be essential for the security of policy holders to keep such resources in hand as will cover the whole liabilities of the company, having regard to the uncertain chances of mortality, rate of interest, expenses etc.

Per MEREDITH, J. There is no express covenant in the policy to pay the plaintiff any profits. Divisible profits are what remains to be divided after certain deductions are made, and the bargain was to pay the plaintiff a fair and equal share of the "divisible profits"; that is, the profits which the company might, after making in good faith all reasonable and proper provision for its safety, divide among policy holders.

Bain, Q.C. (in person), and *Laidlaw*, Q.C., for the appeal.

S. H. Blake, Q.C., and *Maclaren*, Q.C., contra.

ROBERTSON, J.] [Sept. 17.

THE ACME SILVER CO. v. THE STACEY
HARDWARE, ETC., CO.

Libel—False and malicious publication—Allegation of special damage—Demurrer.

In an action of libel, plaintiff's statement of claim alleged that the defendants falsely and maliciously published of and concerning the plaintiff's goods. . . . "We do not keep acme or common plate," and also alleged special damage.

Held, on demurrer, that as the allegation was that the defendants "falsely and maliciously" published of and concerning the plaintiffs, etc., and as special damage was alleged in direct terms (following *The Western Counties Manure Co. v. The Lawes Chemical Manure Co.*, L.R. 9 Ex. 218), if the plaintiffs were able to prove that allegation, they would be entitled to judgment and the demurrer was overruled.

John A. Robinson for the demurrer.

S. King contra.

Practice.

BOYD, C.] [Sept. 8.

SIMPSON v. HALL.

Writ of summons—Service out of the jurisdiction—Rule 271 (g)—Allowance of service—Joint conspiracy—Bona fides—Undertaking to prove cause of action.

Where the alleged cause of action was a joint conspiracy by the defendants, two of whom re-