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CURRENT TOPICS AND CASES.

The proposal to reduce the rate of interest from six to four per cent. appears to be, at least, premature. It is said that the six per cent. rate was established when money was worth seven or eight per cent., and that the commercial rate has fallen considerably. This might be adduced as a reason for contending that the legal rate has been too low, rather than as a reason for asking that it should now be reduced. It must be remembered that the rate applies chiefly to forced loans, involuntary on the part of the creditor, and from which the debtor may at any moment relieve himself by paying the debt. The six per cent. represents the damage to the creditor from his debtor's default to pay him what is actually due to him, and which he is anxious to receive. If there be any truth in the oft-repeated remark about appeals for delay, the six per cent. rate has no terrors for some debtors, who not only submit to the six per cent. rate, but are willing to incur heavy costs in addition. In point of fact, there are not many persons, even now, whose credit is so good that they can obtain money on their personal security at less than six per cent., and it seems to be contrary to public policy that, by a reduction of the legal rate, a premium should be offered to dilatory debtors.

The case of *North British Ins. Co. & Tourville* was decided on questions of fact in the courts below, and did not present any feature calling for report. The Court of Appeal at Montreal (Mr. Justice Hall dissenting) confirmed the judgment of the Superior Court. Both these decisions, resting entirely upon the appreciation of the evidence, have been reversed by the Supreme Court. In his careful examination and analysis of the evidence, Mr. Justice Taschereau certainly makes a strong case of fraud against the insured. But the case is interesting chiefly owing to the observations which the learned judge thought proper to make in view of the fact that the Supreme Court was reversing the judgments of the two provincial courts on questions of fact. A good deal of misconception has existed on this subject, and we therefore give place in the present issue to the text of the opinion.

At a meeting held recently in London, England, at which a number of prominent commercial firms were represented, the absence of a general bankruptcy law in Canada was considered, and a resolution was adopted for submission to the Canadian Government, setting forth that in the opinion of the meeting the fact that no legislation exists applicable to all the provinces of the Dominion of Canada providing for the realization, administration and distribution of insolvent estates, tends to seriously restrict trade between the Dominion of Canada and Great Britain, and that the confidence of British traders to export goods to the Dominion would be increased if there existed Dominion legislation as to insolvent estates providing for (1) a *pro rata* distribution of the proceeds amongst all creditors, (2) the avoidance of preferential payments and voluntary settlements, (3) the filing of adequate accounts by the debtor showing his assets and liabilities, and explaining the deficiency shown by such accounts, (4) the punishment of traders who trade recklessly, fraudulently, and with a know-

ledge of insolvency. It was ordered that the resolution be communicated to the Canadian government.

The decease of Mr. A. H. Lunn is deserving of notice, not merely because one of the senior members of the profession in Montreal is thereby removed, but because Mr. Lunn, during his lifetime, offered a bright example of advocacy governed and directed by high principle, and by a lofty conception of what was due to his chosen profession. So modest and unassuming was he, even in his professional relations, that when, at one time, he was elected *bâtonnier* of the Montreal bar by the voice of his *confrères*, he refused to accept the office, believing that others had stronger claims to the position. Mr. Lunn was appointed a Q.C. by the provincial government. He was a brother-in-law of the late Mr. Justice Cross, of the Court of Appeal, and an uncle of Mr. Selkirk Cross, Q.C. He was admitted to the bar in February, 1854, and had reached the age of 62 when he succumbed, after a long illness, to an attack of heart disease. Mr. Lunn was a partner formerly of the late Mr. Justice Cross, and of Mr. Justice Davidson, now a Justice of the Superior Court. For many years before his death he practised law as the senior member of the well-known firm of Lunn & Cramp.

SUPREME COURT OF CANADA.

9 Dec. 1895.

North British Insurance Company & Tourville et al.

Reversal of judgment on questions of fact. (*Vide Ante*, p. 9.)

Taschereau, J.:—

By this action, instituted in March, 1884, the respondents, as assignees of one Evariste Duval, claim from the company appellant the sum of $5,000, being the amount of an insurance policy issued on the 7th September, 1883, by the appellant to the said Duval, concurrently with other policies in various other companies, amounting altogether to $17,000, on a quantity of lumber then piled in a yard on the river Nicolet, which lumber was but two weeks afterwards destroyed by fire.

The appellants pleaded in answer:—

1. That the policy was obtained by the false and fraudulent represent-

ations of Duval that the lumber insured was worth $30,000, whereas at no time during the existence of the policy was it worth half that sum.

2. That Duval in the application materially exaggerated the quantity and value of the lumber mentioned therein, and thereby obtained from the appellants and other companies, represented by the same agent, simultaneous insurances to the amount of $17,000 over and above $12,000 prior insurance—thus making $29,000 of insurance in all; whereas the lumber thus insured was worth not more than $11,500, the whole contrary to one of the conditions of the policy, which was to be null in such an event.

3. That the insurance was forfeited in accordance with a clause in the policy, because Duval falsely and fraudulently exaggerated the amount of the loss in his claim, by putting it at $36,515.68, whereas it did not exceed $11,500.

After a protracted and voluminous *enquête* the Superior Court gave judgment for the amount claimed. This judgment was confirmed by the majority of the Court of Queen's Bench; Hall, J., in a dissenting opinion, holding that though the charge of fraud had not been made out, yet the lumber destroyed was proved to have been worth not more than $15,482.

The company now appeals from that judgment.

The controversy here, as in the courts below, bears exclusively on questions of fact.

We are of opinion that the appellants have fully made out their case.

It is in order, before reviewing succinctly the salient parts of the evidence adduced on both sides, to consider a proposition of law strenuously relied upon by the respondents. Conceding, on this argument at least, that if the appellants' contentions as to over-valuation and over-insurance by Duval prevail, a clear case of fraud has been made out against him, they pressed upon us the incontrovertible maxim that fraud is not to be presumed, *odiosa et inhonesta non sunt in lege præsumenda*, and argued therefrom that as the appellants' proof of over-valuation rests entirely on presumptions and inferences of facts, their defence must fail. The respondents would thus seem to contend, indirectly at least, that the courts cannot find fraud, unless it be directly proved. But, for obvious reasons, this proposition is untenable.

There would be very little protection against fraud if such was the law. Those who intend to defraud do all in their power to conceal their intent. Their acts could not defraud if they were not clothed with the garb of honesty. A maxim of the criminal law based on the same principle is that the guilt of the accused is never to be presumed. But that does not mean that a criminal shall not be convicted if he has not taken a witness for his crime.

It is, likewise, as a general rule, only by presumptions and circumstantial or inferential evidence that dishonesty can be proved.

As Coquille said a long time ago:

"Selon les règles de droit, la fraude ne peut être prouvée que par con-

" jectures, parceque ceux qui veulent frauder travaillent de tout leur pou-
" voir pour la couvrir." Or, as says Dumoulin: "Elle ne serait pas
" fraude si elle n'était occulte. Ce sont donc les circonstances qu'il faut
" principalement considérer, *fraus consistit in circumstantiis.*"

It is useless to insist further on this point.

Another legal proposition put forward by the respondents at the hearing is just as untenable. They argued that, even if Duval's fraud has been established, they nevertheless are entitled to recover against the company, because, as they contend, they cannot be held answerable for his fraud. This is a startling proposition. They as assignees would have a right of action, though their assignor had none. They would have been subrogated to a claim vitiated by fraud, but would yet claim the right to pocket the benefit of that fraud. What a protection to frauds on the insurance companies would such a doctrine carry if it were to prevail.

I will now briefly review the facts of the case.

They, *in limine*, are of a nature to throw discredit on the respondents' claim. Duval, when he took this insurance in his own name, did so, he has to admit, in direct violation of a contract he had with the respondents, by which he had covenanted that all insurances on this lumber would be taken in their name, as security for their advances. And he not only concealed this from the agent, but concealed it also from the respondents till after the fire. Nay, more, during two days after the fire that one of the respondents was down at Nicolet discussing with him the loss and the claim against the insurance companies, he, Duval, never said a word of these additional insurances he had so taken on the 7th of September. It is only later, and then not from him at all, but from the companies, that the respondents heard of these new insurances.

Now this *suppressio veri*, though perhaps not alone directly affecting the result here, as it may be that Duval was not bound to disclose it, yet cannot but, at the very outset of the case, under the circumstances, tell unfavourably against him. And it may be doubtful that if he had revealed the fact that he was so acting in fraud of an express agreement with his creditors, the agent would have taken the risk at all.

Another feature of the case which, at its inception, cannot but strike one's attention, is the enormous addition made by Duval to the insurance previously carried by the respondents on this lumber. The latter, though they had over $25,000 at stake, and usually kept this lumber pretty fully covered, had insured for $12,000 only, and Duval was aware of it. He, however, on the 1st of September, not only doubles that amount, but takes additional insurances to the amount of $17,000, thus, behind the respondents' back, increasing the insurance from $12,000 to $29,000. The reason he gave to the agent for this large increase was the accumulation of sawn lumber in his yard, caused by the Whitehall Company not taking delivery as agreed. Now, it was then not over two working weeks since this Whitehall Company had ceased their shipments. And so, it would have been in that short space of time, if we believe him, that the

insurable value of the lumber in this yard would have increased from $12,000 to $29,000. The thing is incredible on its face. But we have, moreover, direct evidence by Kelly, the agent of this Whitehall Company, from a statement he personally prepared for his principals three days only before the fire, that the whole quantity of sawn lumber in the yard sold to them, but not yet delivered, amounted to only 545,000 feet, of the value of $5,523.75. So that Duval's additional insurance for $17,000 was over three times more than the value of the lumber upon which he then, himself, justified it.

The controversy, I ought to have remarked before, turns principally on the amount of lumber that the logs must have produced during the season of 1883, the respondents contending that the fire destroyed 3,820,348 feet, as sworn by Duval in his proof of loss, whilst the appellants say that there cannot have been in the yard then more than 1,621,162 feet. As to the value of the lumber and the quantity of logs that came down to the mill, there is no dispute.

The plan resorted to by Duval and the respondents, to establish the quantity of lumber burned is this: to take, in the first place, the amount of sawn lumber carried over from the season of 1882 as per inventory of December of that year, viz.: 844,828 feet; the number of logs made in the winter of 1882-83, and a few scattering logs picked up or bought from others, then deduct from the total the lumber sold before the fire, the lumber saved from the fire, and that produced from the logs unsawn at the time of the fire, and the difference should, as they contend, represent the quantity burned, which, by that method, they would make out to have been 3,820,348 feet, of the value of $36,515.68.

The respondents' case rests, it is rightly remarked by the Court of Appeal, almost entirely on one Marchand's oral evidence, Duval's culler, and on four specifications (pages 58, 59, 60, 61) professing to be four original reports made by him to Duval of the logs cut in the shanties in the months of December, January, February and March of the winter in question. He says those are the original statements made each month by Albert Duval, brother and clerk of his employer, from his (Marchand's) dictation and reading from his culler's book, which he brought down from the shanties; that after A. Duval had completed the statement, it was again checked over to insure correctness; that he (Marchand) then signed the statement, and went back to the shanties for another month's operations. It is a singular fact that a copy of these so-called specifications was never sent to the respondents, though Duval, by his contract with them, had bound himself to do so. The respondents never saw them till after the fire. And one cannot but be struck with the similarity in their appearance, as exhibited to us in manuscript, the paper, the writing, the ruling, which is by hand, and consists of double lines of red and blue pencillings, which would lead one who had to do with documentary evidence to say at once that they were all prepared at the same time. They profess to contain an inventory of the different kinds of logs, their length, and contents in board measure. But Marchand's original

culler's book, from which all these figures were read out, has disappeared. And that disappearance has taken place only after the insurance companies' contestation of this claim.

Now, Marchand's statements, it is amply proved by the best possible evidence that an insurance company can almost ever bring in such a case, cannot be accurate, and no credence can be attached to his testimony. According to his calculations, the cut of logs produced on an average during that season :—

Pine	159	feet per log.
Spruce	87	" "
Hemlock	121	" "
Bass	132	" "
Ash	109	" "

His logs, however, were of the same quality and size as those cut by George Ball and McCaffrey, two respectable mill owners on the same river. Yet, for the same year, Ball's pine logs gave only 70 feet, and McCaffrey's 89, whilst Duval claims 159 feet for his. In spruce, McCaffrey's logs only produced 53½ feet, Ball's logs produced 57, whilst, according to Duval's theories, his produced 87 feet.

In hemlock McCaffrey and Ball got 90 feet per log, whilst Duval claims that he got 121. In bass, Ball got 80 feet per log, but Duval claims to have had 132. In ash, Ball got 80 feet per log, but Duval claims he got 109 feet. On an average, upon the whole of the operations Ball & McCaffrey got 78 feet per log, but he (Duval) claims to have got 116. So that according to Marchand, if his statements were correct, Duval would have got out of the same quantity, quality and kind of logs over 2,000,000 feet more than his neighbours in the same business on the same river in the same year, and made over $20,000 more than they did. Or, to put it in another form, if Duval and Marchand are to be believed, they got out of 59,000 logs as many feet in quantity and as much in dollars as any other mill owner on the same river got the same year, or ever got any year before or after the fire out of 90,000 logs of the same kind and size. Or, Duval would have made, according to the calculations of one Welch, an expert examined in the case, a profit, in 1883, of 57½ per cent. And yet his neighbours were doing a flourishing business, and he was a bankrupt.

If a comparison is made with the result of 1882, the year preceding the fire, taking Duval's own figures, his 59,000 logs gave him in 1883, 2,300 000 feet more than the same number would have given him in 1882 And the average, upon the whole of his operations, would be 116 feet per log for the year of the fire, though only 78 feet for the preceding year An explanation of how he could, in 1883, get 38 feet more per log than his neighbours, whilst in 1882 he got only the same number as they did, has not been attempted. Why, is plain.

Logs have not such a power of expansion.

If we apply the same test to the years succeeding the fire, as far as proved in the case, the result is the same, over 2,000,000 feet more for the same number of logs in 1883.

Every such test that can be applied reveals the extraordinary coincidence that the over-valuation by Duval is over two million feet. This harmony in the results tells heavily against the respondents. Duval would have us believe that his 59,000 logs of 1883 were all of 11 inches and over. But that is incredible. It is in evidence that of the whole cut of 1885 for the same mill, from the same limits, one-third, and of the whole cut of 1887, more than one-half, were under eleven inches. McCaffrey's and Ball's logs for 1883 also comprised a large number under eleven inches.

It is, moreover, in evidence that instead of the logs of 1883 being cut on the eleven inch limit, and being unusually large as Duval and Marchand swear, the foreman who cut the logs and the men who handled them, were ordered to cut them of nine inches and over, and that they did cut them that size, and even down to eight inches.

And the evidence is all one way by the men who made and handled and saw the logs, that they were logs of the same size and description as were made in all other years on the same river from 1882 to 1887 inclusive, for that mill, and for all the other mills on the Nicolet; all the witnesses say they were the ordinary logs of the River Nicolet. Not a single reason has been given, or attempted to be given, to explain why in 1883 alone a different kind and size of logs should have been made, or their production so enormously increased, and a result attained so much larger than that of every other year and every other mill on the same river.

Tourville himself, one of the respondents, has to admit that it is the same description of lumber that is sawn from year to year in the locality.

There is another piece of evidence, the result of which also carries great weight against the respondents. In fact, in every form in which an outside check can possibly be availed of by the appellants, as well remarked by Mr. Justice Hall in the Court of Appeal, the case presents the clearest evidence of uniform and systematic exaggeration of such an extent, and under such circumstances as to be absolutely incompatible with good faith.

It is in evidence that all the lumber sawn at the mill up to the 14th of August was piled and loaded under contract at 40 cents per 1000 feet, for which Duval paid $605.64.

Now $605.64 at 40 cents per thousand feet gives 1,514,100 feet, or say in round numbers 1,600,000, as the total output up to the 14th of August, two weeks before the application for insurance, and five weeks before the fire. Now, as he claims that the fire destroyed 3,820,348 feet, and that he sold 2,232,279 feet before the fire, all sawn during that season except 844,828 feet, it follows he claims that he sawed 5,207,799 feet before the fire. And if 1,600,000 feet only were sawn up to the 14th of August, it follows he sawed the balance of 3,600,000 in the five weeks from the 14th August to the 21st of September, whilst it took him eight weeks after the fire from the 21st of September to the 17th of November, running under pressure, to saw 1,427,351 feet, in that same mill, after it had been put in a better condition.

Or, to put it in another way, his mill during 30 days would have cut 120,000 feet a day. And yet the respondents have to admit in their factum that from 35,000 to 40,000 a day was the utmost that it could ever give. And here again this evidence establishes at over 2,000,000 feet Duval's over-valuation.

The same result is attained by a comparison of the cost of sawing. Taking Duval's own figures again, he would have been able to saw 2,000,000 more feet before the fire for the same wages that it would have cost him after the fire, when the mill had been repaired. Why, could not, of course, be explained.

Then, by asserting as he does that he sawed 5,207,000 feet before the fire, he claims that he sawed before the fire for $1.50 per 1000 feet, the same lumber that cost him $2.50 per 1000 feet after the fire in a better mill.

Again, it cost him in wages to run that mill 48 days after the fire $3,555.51 or $74 a day, against $7,862.84 for a pretended 144 days before the fire, or $54 per day. At the same rate of $74 per day he must have run only 106 days before the fire, and, at 30,000 feet per day, cut only 3,180,000 feet before the fire, and not 5,207,000 as claimed.

The respondents attempted to support their estimates by proving the capacity of the mill and the number of days it was in operation during that season. But far from succeeding in doing so, their evidence on this point turns out to be more favourable to the appellants' contentions than to theirs.

According to one Chabot's evidence, upon which they mainly rely, on this part of their case, the mill would have cut 75,000 logs. Now Duval himself cannot claim more than 59,000; the boomage account is there to check him. So that Chabot evidently proves too much; his exaggerations appear from his own figures. Moreover, according to his own estimates, the cut gave in 1883 only 80 feet per log, whilst Duval claims 116. So that on the controversy as to the average output, the respondents' principal witness entirely supports the appellants' contentions. That which makes against the point of him who swears may be believed, although that which makes for it is disbelieved.

The respondents' evidence as to the number of piles in the yard is also unreliable. Assuming the number claimed by Duval to be proved, we still are without satisfactory evidence of the quantity contained in each pile. We have on this point nothing but opinions of a vague and unreliable nature, proved withal to be untenable by the various tests to which I have alluded. The same may be said of the evidence as to the number of logs sawn after the fire.

As to the evidence of the two Duvals, the remarks that I made as to Marchand's evidence fully apply.

Their figures are based on Marchand's statements. And they, like him, swear to what is conclusively proved to have been physical impossibilities. The number of witnesses who swear to such things cannot have any weight. *Non numerantur, sed ponderantur.*

Such are the principal features of the evidence in the case.

If, as has been well remarked (Wills' Circumstantial Evidence, p. 32) the force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove, the appellants' case is as clearly made out as a case of this nature can ever possibly be.

The facts of evidence they rely upon are unmistakeably proved. Their absolute incompatibility with the respondents' theories is also patent. There is no room for any other solution, if these facts are true, but that Duval grossly and wilfully exaggerated the quantity of his lumber both on the 1st of September on his application for insurance, and in his statement of loss after the fire. (J. Bentham, *rationale* of judicial evidence, vol. 7, p. 76). It is an utter impossibility that the calculations resulting from the respondents' own evidence could be correct, and that Duval had the quantity of lumber he claims to have had. And upon the correctness of these calculations, there is no room for controversy. The logic of figures is irrefutable.

Such a number of cogent circumstances, so closely connected with each other, each separately tending to the same mathematical result and rationally consistent with but one solution, circumstances which it is impossible to conceive to have been fraudulently or designedly brought together, and as to which there is no room whatever for the hypotheses of confederacy or error, irresistibly lead to the conviction that the fact of over-valuation by Duval, to which they all unequivocally point, is true. The united force of so many coincidences carries of itself, the conclusion to which its various elements converge. Such an array of facts and figures cannot possibly mislead. It amounts to demonstration, carrying with it absolute certitude, which no oral evidence can weaken.

The disappearance, unsatisfactorily explained, of the culler's pass books, and of all the papers which might have thrown any light upon the controverted facts, is a feature of the case that I should have alluded to previously. The rule *omnia præsumuntur contra spoliatorem* is one based on common sense and reason. If these papers had supported the claim, they would have been scrupulously taken care of, and their non-production justifies us, in law, to come to the conclusion that they would, if forthcoming, be adverse to the respondents' contentions. Mill-owners, it is proved by Rutherford, Welch and Ward, always preserve these books. And when was it that they disappeared? Only when a contestation by the insurance companies was dreaded. They were in existence when an arbitration about this same fire mentioned in the record took place, but were not produced before the arbitrators, though called for. The ignorance or loose business habits of Duval are invoked as an excuse for their non-production, but "il ne faut pas prendre l'ignorance pour l'innocence, ni la rusticité ou la rudesse pour la vertu."

The appellants have made out the clear case that is required to justify us, nay to oblige us, on an appeal, even upon questions of fact, not to

adopt the conclusions of the courts below. If the case had been tried by a jury, a verdict for the respondents would undoubtedly have been set aside, as being against the weight of evidence, and a new trial ordered. But, as we are here judges of the facts of the case as the courts below were, our judgment must be to dismiss the action.

Further, there are abundant reasons why this case should not be held to fall under the general rule that, upon such an appeal against the concurrent findings of two courts, we should not interfere.

First.—It was not tried by a jury. Secondly—The Judge who determined it in first instance did not hear the witnesses, but gave his judgment upon written depositions. 3rdly. The Court of Appeal expressed great doubts in adopting the findings of the judge of first instance. 4thly. The judgment of the Court of Appeal was not unanimous, Mr. Justice Hall finding it proved that Duval had over-insured for more than one-half the quantity and value of the lumber. 5thly. By the *considérants* of the judgment of the Superior Court, it does not appear that the non-production by the respondents of the written documents bearing on the controversy was taken into consideration. 6thly. The Court of Appeal appears to have given weight to a piece of evidence of undoubted illegality, the award upon a certain arbitration about this fire, to which the appellants were not parties.

On all these grounds the case is distinguishable from *Gray* v. *Turnbull* (L. R. 2 H. L. Sc. App. 57); *North German* v. *Elder* (14 Moo. P. C. C. 241); *Allen* v. *The Quebec Warehouse Co* (12 App. Cas. 101); *Council of Brisbane* v. *Martin* (App. Cas. 94, 243); and that class of decisions to which we have ourselves given effect in this court in various instances (*inter alia* *Arpin* v. *The Queen*, (14 Can. S. C. R. 736); *City of Montreal* v. *Lemoine* (23 Can. S. C. R. 390; *Schwersenski* v. *Wineberg* (19 Can. S. C. R. 243), and from which we do not intend here to deviate.

The case falls under the exceptions foreseen in all the decisions wherein the general rule was followed, and the following have their full application. Indeed they enlarge the duties of a Court of Appeal further than is required to justify, if necessary, the allowance of this appeal.

The Judicial Committee is not bound by the decision of the court below upon a question of evidence, although in general it will follow it; *Canepa* v. *Larivos* (2 Kn. 276).

The parties are entitled to have the decision of the Court of Appeal on questions of fact as on questions of law, and the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has not heard nor seen the witnesses, for which due allowance should be made.

As a rule a court of appeal will be disinclined to interfere, when the judge hearing the witnesses has come to his decision upon the credibility of witnesses as evidenced by their demeanor, but otherwise in cases where it depends upon the drawing of inferences from the facts in evidence. *The Glannibanta* (1 P. D. 283). And in *Bigsby* v. *Dickinson*

(3 Ch. Div. 24) it was held that: "Although the Court of Appeal, when called on to review the conclusion of a judge of first instance, after hearing witnesses *viva voce*, will give great weight to the consideration that the demeanor and manner of the witnesses are material elements in judging of the credibility of the witnesses, yet, it will, in a proper case, act upon its own view of conflicting evidence. "Of course," said James, L. J., in that same case, "if we are to accept as final the decision of the court of first instance in every case where there is a conflict of evidence, our labors would be very much lightened, but, then, that would be doing away with the right of appeal in all cases of nuisance, for there never is one brought into court in which there is not contradictory evidence." And Bramwell, L. J., said: "The legislature has contemplated and made provision for our reversing a judgment of a vice-chancellor when the burden of proof has been held by him not to have been sustained by the plaintiff, and where he has had the living witnesses and we have not. If we were to be deterred by such considerations as these which have been presented to us from reversing a decision from which we dissent, it would have been better to say, at once, that in such cases there shall be no appeal."

And in *Jones* v. *Hough* (5 Exch. Div. 122), Bramwell, L.J., said: "First, I desire to say a word as to our jurisdiction. If, upon the materials before the learned judge, he has, in giving judgment, come to an erroneous conclusion upon certain questions of fact, and we see that the conclusions are erroneous, we must come to a different conclusion and act upon the conclusion that we come to, and not accept his finding. I have not the slightest doubt such is our power and duty. A great difference exists between a finding by the judge and a finding by the jury. Where the jury find the facts, the court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like. I have no doubt, therefore, that it is our jurisdiction, our power and our duty; and if, upon these materials, judgment ought to be given in any particular way different from that in which Lindley, J., has given it, we ought to give that judgment."

The cases of *Shortnew* v. *Stewart* (L. R. 3 P. C. 478), and *Symington* v. *Symington* (L. R. H. L. 2 Sc. App.), though they have but a limited application, yet may be referred to on the point.

Also, what our present Chief Justice said on the subject in *Phœnix* v. *Magee* (18 Can. S. C. R. 61), and the case of *Russell* v. *Lefrançois* (8 Can. S. C. R. 335), where this court reversed the concurrent findings of the two courts below upon a question of fact, and the Privy Council refused leave to appeal. True it is, then, the credibility of any of the witnesses was not directly questioned; but here, even upon that point, we are in the same position as the two courts below were, their conclusions having been exclusively reached, as ours have to be, upon the mere reading of written depositions.

In *Atkins* v. *McKelcan* (App. Cas. 1895-25, 310) the Privy Council, and in the *Queen* v. *Chesley* (16 Can. S. C. R. 306), this court also reversed on a question of fact.

We are here, according to the express terms of the statute, to give the judgment which, in our opinion, the Court of Appeal should have given. And that court should have exercised their power to reverse the decision of the Superior Court. The law would be absurd, indeed, if, on the one hand, it gave an appeal on questions of fact, whilst, on the other hand, such an appeal could never be allowed. It is on the assumption that there may be error in the judgment, although two courts have concurred therein, that the right of appeal is given in such a case, even on questions of fact.

"The judges of the appellate court are as capable in such a case, says Lord Kingsdown, in *Bland* v. *Ross* (14 Moo. P. C. C. 236), "and indeed are presumed to be more capable) of forming an opinion for themselves as to the proof of facts and as to the inferences to be drawn from them."

In *Chand* v. *Meyers* (19 Gr. 358), Strong, V. C., now Chief Justice of this Court, said upon this point:—

"I concede that when there is a balance of evidence causing the determination of a question of fact to be dependent altogether on the credit to be given to particular witnesses, it is almost impossible for the court on such an appeal as this, to overrule the decision of the master in whose presence the witnesses have been examined. But if there is, as I find here, a balance of direct testimony, and the circumstances point strongly to one conclusion, and against the other, I know no reason why the court may not review the evidence, and reverse the master's finding."

And the learned judge reversed the master's finding, discrediting a witness, upon whose evidence the master had determined the case.

And in *Morrison* v. *Robinson* (19 Gr. 480), the same learned judge held that the rule that where the decision of a question of fact depends altogether upon the credit to be given to the direct testimony of conflicting witnesses, the Court, as a rule, will adopt the finding of the master, who has had the advantage of hearing the witnesses, applies only where the evidence being directly contradictory, there are no circumstances pointing to the probability of one statement rather than of the other. We do not fail to take into consideration, I need hardly say, that the fact of the two provincial courts having come to the same conclusion enhances the gravity of our duty, and imposes upon us the strict obligation not to allow the appeal without being thoroughly convinced, more than might perhaps be required under other circumstances, that there is error in the judgment. But at the same time, we would unquestionably be forgetful of our duties, if we did not form an independent opinion of the evidence, and give the benefit of it to the appellants, if they are entitled to it. Over insurance must be put a stop to, as much as it is in the power of the courts to do it. Therein lies one of the greatest sources of fraud in connection with the insurance business. If the assured is not in part a co-assurer with the company, that is to say, if the parties to the

contract have not a common interest in the preservation of the property insured, one of the most efficient safeguards against fraud and crime is removed. Any such contract where the assured might expect to make a profit by the destruction of the property insured is, in law, tainted with immorality. And to require from a company, when called upon to pay a loss, over which hangs any suspicion, a stronger proof than the appellants have made in this case, to defeat a fraudulent claim, would be virtually to leave the assurer at the mercy of the assured, a result which obviously, in the public interest, even more than in the companies' interest, should by all possible means be averted. *Interest reipublicæ ne maleficia remaneant impunita.*

Appeal allowed; action dismissed; costs in the three courts against respondents.

Dunlop, Lyman & Macpherson, for appellants.
Trenholme, Q.C, and *Lafleur*, counsel for appellants.
Béique, Q.C., and *Geoffrion, Q.C.*, for respondents.

LORD RUSSELL ON LEGAL EDUCATION.

The authority of the Lord Chief Justice will probably be sufficient to convince the public that the need for a reform of the system of education under which students for the Bar or the examinations of the Incorporated Law Society are trained is both undeniable and urgent, but it is improbable that a perusal of the report of his address will persuade lawyers either that his attack on the present system is justifiable or that the promised advantages of his own scheme are likely to be realized. The staple matter of the attack is to be found in a comparison between the practice of this country and that in vogue abroad. In France, in Germany, and, above all, in the United States they have schools of law attached to the Universities. Such schools we have also, although Lord Russell overlooked the fact, attached to the universities of England and Scotland; but preparation at them is not a necessary qualification for admission to the legal profession. As a consequence it follows, if we rightly understand the address, that our text-books are not read, and the judgments of our judges are not cited abroad, and also that our legislation has assumed or preserved an unmethodical and unsystematic character. If the argument is good for anything, it must be implied that the text-books of the countries mentioned are cited, and the judgments of their judges are quoted, in foreign States, and that this, in some way, is a national advantage; and, further, that their legislation has the unquestionable merit of being more methodical and scien-

tific than our own. How ill-verified in fact this implication is it is hardly necessary to say; but, if it were as true as it is erroneous, it would not prove that when a legal university is set up in London there will be any change for the better. Why our legislation is as bad as it is a late Attorney-General should know as well as anyone, but assuredly legal education has little to do with the matter. Popular Legislatures cannot produce well-drawn measures, and no extension to amateur lawyers of the privilege of listening to lectures is likely to create a demand on the part of the public for anything better than the patchwork of our annual statutes. It would be as unreasonable to complain that English grammars are not studied abroad as to lament the lack of interest in our text-books or in the volumes of our law reports in any country where the rule of the common law does not prevail; but it is needless to consider whether the institution of the 'Inns of Court School of Law' would add to the circulation of our legal literature, because that is a matter which concerns only the owners of the copyrights. By all means, as Lord Nottingham said in the Duke of Norfolk's case, 'let us resolve cases here, so that they may stand with the judgment of men when debated abroad'; but that end will not be secured by the exportation of text-books. It may well be that the institution of a body of writers and lecturers who would busy themselves with the study and teaching of the more philosophical parts of the law, would tend to remove professional prejudices and to introduce greater variety and adaptability into methods of argument, and so enable us to conform more nearly to Lord Nottingham's rule. We may be confident that these advantages are to be gained from the influence of such a class of non-practising lawyers, not only by reason of Lord Russell's assurance, but also because of the actual experience gained from examples of the professors and lecturers of the existing universities.

It was a strange omission to disregard the law schools of Oxford, Cambridge, and University College, but it was surely stranger still to leave unnoticed the works of Sir Henry Maine, of Messrs. Maitland, Dicey, Muirhead, Moyle, Westlake, and Hall, and of Sir William Anson and Sir Frederick Pollock, when dealing with writers on legal subjects in English. If the works of these authors are not cited abroad, what hope can there be for the professors of the new institution?

The comparison made by Lord Russell with the education of

the medical profession was not fortunately chosen. To reach high-water mark as a physician it may be necessary, as he states, to master several sciences; but is the same level to be obtained at the Bar without the cultivation of many capacities? A lawyer's art has not, perhaps, shown the distinct step towards proficiency which all arts relying on the natural sciences have made with the unparalleled advances of these sciences, but success in it is not obtained by chance or without careful equipment. The system of legal education in vogue is much misunderstood by the public as well as by the evening newspapers, which have drawn from the Lord Chief Justice's address the inference that barristers and solicitors are an ignorant class of persons from whom the law has exacted no sufficient guarantee of qualification. It is not, however, ill-adapted for its purpose. The Final Examination of the Incorporated Law Society is said to be more searching than the Bar Examination; and it reasonably might be so, since it marks, as a rule, the end of a solicitor's reading, while the examination of a student for the Bar is now usually taken before his reading in chambers begins. For nearly every serious aspirant to forensic honours the real training ground is the chambers of a barrister in full work. He goes there to see how the work is done, just as a medical student goes to the operating theatre. He can profit but little by his attendance unless he has first mastered the elementary text-books of the principal divisions of law; but he may, in ordinary cases, have read all the law in the library, and have heard all the lectures delivered at a German university, without learning how to pick the points out of a brief or to discover the requisitions which he ought to frame upon an abstract of title. The fashion of our day is, as it was the fashion of that of Dr. Johnson, to believe that everything can be taught in lectures; and it is as true now as then that a clever man will learn all or nearly all that can be so taught from a book in half the time the lectures occupy, and will prefer to do so. This is the reason why lectures do not succeed in drawing large audiences of students; and having regard to it, to compel the attendance of men who are able to pass fair tests without the lecturer's aid would be grossly unfair.—*Law Journal* (*London.*)