

PHENIX MUTUAL INSURANCE CO. V. DEANS—RECENT ENGLISH PRACTICE CASES.

losses occurred during the currency of the undertakings an assessment of all outstanding balances upon premium notes would be proportionate. He then proceeded to deal with the objection of Mr. Osler, that two former assessments were irregular, and that as a consequence the undertakings assessed in such former assessments not being included in the final assessments rendered the final one void. He held that there was not sufficient evidence of any irregularity, and that the objection is not open to the defendant, as he was not included in such former assessments, and that it appeared from the evidence that even if such undertakings, assessed in the alleged irregular assessments, had been included in the final assessment, the final assessment would still have required the calling in of all outstanding balances on all undertakings, and that therefore the defendant had not been prejudiced by such alleged irregularity. In any event, he would have had to pay the full amount of his undertaking. No fraud was alleged, and no mistake at all affecting the fairness of the assessment had been established, and held that an assessment is not invalidated by small errors made in good faith, and which have not produced damage to the member complaining, citing *Marblehead Mutual Insurance Co. v. Underwood*, 3 Gray (Mass) 210; *Long Pond Mutual v. Houghton*, 6 Gray 77, and concluded his judgment as follows:]

I have discussed this case at considerable length, because the conclusions which I have come to will probably affect the result in a number of cases yet remaining to be tried, but after the most careful consideration of all the objections argued, and of the evidence, and after a perusal of all the cases to which I have been referred by the able counsel concerned, I am of the opinion that the objections taken ought not to be allowed to prevail, and that the defence therefore fails. I am pressed, too, by another consideration—the chief creditors of this company are members of the company itself—members who have been unfortunate enough to incur fire losses, and who look not unnaturally to their fellow members to abide by their several undertakings, and to submit to any assessment necessary to provide funds for meeting their claims. All the members were in the same boat, and the present creditors might, had not the fates been unpropitious, been the losers to the extent of their undertakings only instead of, in many in-

stances, to the amount of their policies. In a matter, then, like this, which is really a contest between partners, I think it would be unjust and inequitable in the highest degree, except upon the clearest evidence and for the soundest of legal reasons, to hold that any mere technical objections, or slight errors or mistakes should be allowed to prevail, and the efforts to realize the available assets of the company utterly frustrated. It is manifest that even with the utmost prudence, skill and care, a large portion of these assets will not be collected. Should the liquidator be more than usually successful I fear there will be, nevertheless, a considerable deficiency, and that creditors cannot hope to be paid in full. In this case the defendant has failed, in my humble judgment, to make out a defence which will relieve him from the liability he has incurred by subscribing his name to the undertaking sued upon.

There will be judgment for the plaintiffs for \$34.12 and costs.

RECENT ENGLISH PRACTICE CASES.

BROWN V. COLLIS.

Imp. J. A. s. 18, 19—Ont. J. A. s. 13—Court of Appeal—Jurisdiction.

[W. N. 83, p. 155.]

A judge of first instance cannot send a petition direct to the Court of Appeal without his making any order. The Court of Appeal has no jurisdiction to hear the petition in the first instance, but the case can only be brought before them on appeal after the judge of first instance has decided it.

IN RE LEE AND HEMINGWAY.

Imp. O. 55, r. 1—Ont. r. 428—Discretion as to costs.

Land belonging to persons under disability was taken by a company under the compulsory powers of a special Act. A petition was presented for payment out of the money to persons who had become absolutely entitled. The Act contained no provision for the payment by the company of the costs of such a petition. The petition asked that the company might be ordered to pay the costs.