

in the case of Assessors in the District Courts. The oath which Assessors in the Wardens' Courts are required to take differs from that which the Assessors in the District Courts take. The latter swear "to give a true verdict according to the evidence;" whereas the Assessors in the Wardens' Courts swear to give "a true finding and decision" according to the evidence. This seems to show that their finding was intended by the Legislature to be more than a verdict, upon which judgment was afterwards to be entered by the Court;—that it was, in fact, to be the final decision. And this view is strengthened by section 69, which enacts that "a minute of every such decision shall be entered by the Warden in a book to be kept by him for that purpose, and shall be signed by the persons who concur in making such decision;" and no formal order shall be necessary, &c. I cannot doubt, therefore, that the Legislature intended to give to the Wardens and Assessors a concurrent and co-ordinate jurisdiction over the whole case. They are to give such a finding and decision, according to their judgment and conscience, as is just: the Wardens taking care to keep them within the provisions of the several Gold Fields Acts, and the Rules and Regulations made under the authority of those Acts, which constitute the special law of the Courts created by those Acts.

In deciding the case of *Pearson v. Clarke*, Mr. Justice Richmond found himself slightly embarrassed by the language of "The Resident Magistrates Jurisdiction Act, 1862," which gives an appeal on a point or points of law only, which seemed at first sight to militate against a decision according to equity and good conscience. There was this dilemma: Was the Supreme Court, on hearing the appeal, to make itself a Court of conscience, or did it compel the Justices to follow legal technicalities, as the Supreme Court does? But there is no such source of embarrassment in the Gold Fields Acts—there is nothing to prevent the Warden or the Warden and Assessors from coming to a decision which he and they deem just, without regard to rules of law or the practice of any Court of law or equity, because the appeal is not on matter of law only, but is also on questions of fact. I do not think this releases the Warden from directing the Assessors in any point of law which may arise, and it is certainly his especial duty to know the provisions of the Statutes under which he acts, and to keep the Assessors within their provisions; but when he has done that, the "finding and decision" must still be just, in accordance with the 68th section. There is, no doubt, a difficulty under the Act of 1866, not removed by any subsequent Act. There is a total silence as to the necessity for unanimous decision or decision by the majority. The 69th section, by providing that a minute of the decision shall be signed "by the persons who concur therein," seems to imply that there may be persons who do not concur therein; and, therefore, that the finding and decision by a majority was contemplated: but what majority? A majority of the four Assessors, or a majority consisting of two Assessors and the Warden? This is nowhere cleared up. It does not occur in this case, because the Assessors and the Warden were unanimous; but unless some provision be made, more specific and clear than is implied by the expression the "persons who concur," cases of great difficulty may arise. The County Courts Act of Victoria provides that when the two Assessors agree, their verdict shall be the judgment, and that when they are divided, the decision of one Assessor and the Judge shall be the judgment. The Victoria Mining Statute is equally unambiguous, though by a different contrivance. In *Broadbent v. Vanrennan*, where a Judge of the County Court sat alone by the choice of the parties, Sir William Stawell spoke of the Judge directing himself on the law, and then as a jury deciding on the facts, keeping the two functions distinct. But the constitution of the County Court, and its ordinary course of practice (above a certain amount), are similar to the practice of the Supreme Court. There is no deciding "in a summary way." The parties may dispense with Assessors, but when they do so, they give to the Judge jurisdiction over the facts, without disturbing his normal jurisdiction in matters of law. But the reverse is the case in the Warden's Court. He decides in a summary way. The parties may have the assistance of Assessors if they desire it, but, as it seems to me, without changing the summary nature of the proceedings and decision. They assist the Warden, and with him form one Court. For this view I have already given my reasons as drawn from the Statute of 1866.

After a careful examination of the several affidavits and the reports of the trial, I come to the conclusion that the Court of the Warden before which *Eager v. Grace* was heard was not illegally constituted, and that there is, so far, no ground for a writ of prohibition. All the points raised before the Warden may be taken on appeal, and are proper subjects for the consideration of the District Court, as such Court of appeal. Some, perhaps, may have been good grounds for a rehearing before the Warden, but an appeal, lying, as it does, to a professional Judge, both on questions of law and of fact, is a much more satisfactory proceeding. It is, in fact, a new trial, which meets all that the case requires. I come now to the second point. Did the writ of execution issue too soon? If so, is that a ground for prohibition? An appeal is a remedy by Statute. An appeal never lies unless given by Statute—*Rex v. Cashibury Justices* (3, D. & R. 35). We must look to the Statute giving an appeal for all the terms and conditions upon which appeal is allowed. *Prima facie*, execution is the consequence of judgment; and I think that where a Statute does not expressly or impliedly take away that consequence, there is no stay. No case was cited to show that a stay of execution follows from the mere giving of an appeal; and my reason for thinking that it cannot be so is, that an appeal being a creation of the Statute Law, no incident can be engrafted on it but such as the Statute warrants. In numerous cases where Statutes confer a right of appeal, they also contain provisions as to stay of execution, security, or restitution. Power given to a Court by Statute to stay execution, with or without conditions, implies that such power would not otherwise exist. Mr. Macassey has cited many such instances. They all seem to me to show that without such enactment there would be no stay of execution. The learned counsel has very ingeniously argued that those Statutes which use some such words as these:—"There shall be no stay of execution unless the appellant give security,"—imply that there would have been a stay of execution without such words. But what they seem to me to import is this: Unless the appellant give security, the ordinary consequences of judgment, viz., execution, shall follow. But in the Gold Fields Act there is no such provision, and the words of the 81st section, empowering the Judge of the District Court, "if necessary, to order restitution as the case may require," seems to admit of no other construction than that execution had previously issued. I certainly think that it is to be lamented that the Statute did not provide for a stay of execution on terms: