which objection was not taken before the Magistrate. The learned Judge was, in my opinion, wrong in the view he took of the appeal (I am of course speaking only upon the material before me—and the facts may be quite different); but he has the same power to go wrong that any other Judge has.

That such a decision is not on a matter preliminary, but on the merits, is to my mind, quite clear. . . .

[Reference to The Queen v. Justices of Middlesex (1877), 2 Q.B.D. 516, 519, 520.]

In the present case the Court did enter into the appeal, and "did decide upon the legal merits of it."

It makes no difference if the learned Judge misconstrued sec. 753 of the Code—he has the power untrammelled by us to make mistakes: and I can find no reason why a misconception of the meaning of a statute is any worse than a misconception of a common law principle or equitable rule.

If the statute was not present to the mind of the Judge, then his judicial mind was not "applied to the construction of the statute," just as in the case in 2 Q.B.D.; and that can make no difference. It is no worse to fail to take into consideration a statutory provision than a well-established common law or equity principle. "In the hurry of business . . . the most able Judges are liable to err," says Lord Kenyon, C.J., in Cotton v. Thurland (1793), 5 T.R. 405, 409; and, if Popham, C.J., could say of himself and his brethren, as he did in Sir Walter Raleigh's Case (1603), 2 How. St. Tr. 18, "But we know the law," a greater than he has said, "God forbid that an attorney or even a Judge should be held to know all the law."

It would be going too far to assert a jurisdiction in this case to grant a mandamus—and considerations which should be elementary would have prevented the application being made. . . .

[Reference to Lucy v. Bishop of St. David's (1702), 7 Mod. 59; Body v. Halse, [1892] 1 Q.B. 203, 207; Berkeley Peerage Case (1811), 4 Camp. 401, 419; In re Watkins, [1896] 2 Ch. 339; Jones v. Owen (1848), 5 D. & L. 674; The Golubchick (1840), 1 Rob. Ad. Rep. 147; In re Thompson (1861), 9 W.R. 208, per Wilde, B.; In re Aylmer (1887), 57 L.J.Q.B. 168, per Lord Esher, M.R.]

The motion must be dismissed. I have not considered whether, all parties consenting, the Court below cannot open up the matter proprio motu.