

3. That the direction by the creditors to pay these preference claims without putting them on the dividend sheet was illegal.
 4. That the power given to the judge by s. 4, es. 16, to control the assignee is in the nature of giving him personal directions as to his duties, enforceable by imprisonment on default, but that the judge has no power to enforce his orders by judgment and execution though he might possibly compel an assignee to pay costs incurred by his disobedience by making it a condition that he should pay them before he could be considered purged of his contempt.
 5. That the only remedy of the assignee under these circumstances was to apply for a prohibition.
- Remarks as to how far admitting jurisdiction waives right to prohibition.

[Chambers, Jan. 23, 1866.]

A summons was issued on 20th December last, calling on the Judge of the County Court of the County of Elgin, and on Duncan Munn, to show cause why a writ of prohibition should not issue to prohibit the further proceeding in the same County Court upon two writs of *fi. fa.* issued on 29th November, 1865, at the suit of Munn, against the goods of Andrew Cleghorn, assignee to the estate of Charles Roe, an insolvent, and upon the rules of court or judgments upon which the said writs of *fi. fa.* issued, and the orders of the judge mentioned in the rules of court, on the ground that the judge had no jurisdiction in the matter to which the said orders, rules, judgments and writs relate,—the resolution of the creditors of the said Roe, to enforce which the orders were made, not having been validly passed by the creditors under the Insolvent Act of 1864, and, even if valid, not containing any instructions which the said judge could lawfully enforce; and no duty being imposed by the terms of the said act upon the said assignee, such as the said orders assume to enforce. And on the ground that the judge of the County Court, even in cases in which he had jurisdiction to enforce the performance of the duties of assignees, has no power to award costs, but can only proceed for contempt of court.

From the papers filed, it appears that the estate of Charles Roe, of St. Thomas, in the county of Elgin, was put into compulsory liquidation; and Andrew Cleghorn, of the city of London, was about the 6th February, 1865, appointed assignee of the estate.

That at a meeting of creditors held at London, on 21st of May, 1865, the following resolution was adopted by the creditors then present:—
“That the assignee be authorized to pay at once all claims for wages, upon being satisfied of their correctness, according to the provisions of the statute in that behalf.”

That at this time no dividends had been allotted, or dividend sheets prepared, nor had any dividend been made up at the time this application was made.

That Munn claimed wages out of the estate, amounting to \$127 35, and demanded payment shortly after the meeting of creditors held in May, and the assignees refused payment.

About the 11th of July last, Munn filed a petition, addressed to the judge of the County Court of Elgin, signed by his attorney on his behalf, praying that a summons might be granted calling on the assignee to show cause why he should not pay the claimant the amount of his claim, or so much thereof as, upon examining witnesses thereon, might be found due to claimant; and that the assignee be ordered to produce all books, &c., and also to show cause why the

judge should not order the said claim to be peremptorily paid.

The attorney of Munn, with the petition, filed his own affidavit, in which he stated that, after the meeting of creditors and on the day thereof, the assignee told him that he would settle about said claim soon after the said 24th May. That since that day he had on two occasions demanded payment of the claim from the assignee, but he on both occasions refused, and refused to appoint a day for receiving evidence of the claim, and said he would not pay that or any other claim for wages, without a judge's order.

The assignee, in his affidavit, states he had no notice of the filing of the petition by Munn, on which the summons issued. He also stated that it is not true that he said he would not pay the claim of Munn, or any other claim for wages, without a judge's order. But when he, the assignee, had declined to pay Munn's claim, Munn's attorney said he would get a judge's order and compel him to do so. Whereupon the assignee said, “if you compel me to do so, I cannot help myself.”

The claim of Munn was as follows:

Charles Roe to Duncan Munn. Dr.	
To 19 days' wages, from Nov. 11, 1864,	
to Nov. 29, inclusive, as seaman, on	
schooner Josephine, at \$1 25....	\$23 75
Amount of due bill dated Oct. 4, 1864,	
for wages due me for sailing Indian	
Maid to Oct. 3, 1864.	59 35
To wages from Oct. 4, 1864, to Nov. 10,	
1864, inclusive, at \$35 per month	44 25
	<hr/>
	\$127 35

The summons issued on July 11, 1865, by the judge of the County Court of Elgin, upon reading the petition of Munn and the affidavit of his solicitor, requiring Andrew Cleghorn, the assignee of the estate of the insolvent (Roe), to show cause why he should not pay the claimant the amount of his claim filed, or so much thereof as might, upon examining witnesses, be found to be due and payable to claimant; and he was also required to produce the books, and to show cause why the judge should not order the claim to be peremptorily paid.

The summons was served on the assignee on the 19th of July.

On the 24th of July, the matter was proceeded with before the judge. Evidence was gone into. It was proved that a note, given by the insolvent for \$59 35, was on a settlement for wages due Munn, as a mariner on board of a vessel, to the 4th of October, and in addition another sum of \$23 75, in the whole \$83 10; and that Munn was paid on account of the due bill, \$35 25; leaving due him \$47 85. The learned judge thought Munn entitled to be paid that sum, and ordered the same to be paid him accordingly forthwith, with costs.

The assignee did not attend on this summons; and he stated in his affidavit, that believing the judge had no power to make the order asked for, he did not attend on the summons.

On the same day, a formal order was drawn up, by which the judge ordered “that Andrew Cleghorn, the said assignee, do, upon service on him of a copy of this order, forthwith pay to the said claimant, his solicitor or agent, the sum of forty-seven dollars and eighty-five cents, being