

indicted for feloniously displacing a railway switch and was tried by a Judge without a jury under the Speedy Trials Act. After hearing the evidence and the speeches of counsel the Judge reserved his decision, and before giving it he examined the switch in question, neither the prisoner nor any one on his behalf being present. The conviction was quashed, the Queen's Bench Division (Armour, C.J., Falconbridge and Street, J.J.) holding that even if the trial Judge had been warranted in law in taking the view, the manner of his taking it without the presence of the prisoner, or of any one on his behalf, was unwarranted.

That seems to have been all that was required for the decision of the case, but Armour, C.J., in delivering the opinion of the Court goes further and deals with the question of jurisdiction, and concludes that there was no authority in Ontario either at common law or by statute, to warrant a Judge trying a case without a jury in taking a view. He says:—

"It is clear that there is no statute authorizing the Judge to have a view in such a case, and we have to ascertain whether there is otherwise any authority in support of the right of a Judge to take such a view. If the Court had power at common law, an inherent power, to order a view by a jury in a trial for a criminal offence, it might well be argued that when the functions of the jury devolved upon the Court by statute, the Court became possessed of the power itself to take a view. The statute 4 Anne ch. 16, sec. 8, did not extend to criminal cases, and neither before it nor after it, until 6 Geo. IV. ch. 50, sec. 23, could a view be had in a criminal case without consent. (See 1 Burr. 253 in margin); In *Rex v. Redman*, 1 Kenyon 384, there was a motion for a view on behalf of the defendant, who stood indicted for a forcible entry. *Per Curiam*.—There can be no view in a criminal prosecution without consent, and the practice was so before the Act (4 Anne ch. 16). See *Anonymous*, 1 Barnard 144; 2 Barnard 214; 2 Chitty 422; *Commonwealth v. Knapp*, 9 Pickering, at p. 515, where it is doubted whether even with consent a view could be granted in a felony. There was no authority, in my opinion, for the learned Judge taking the view which he took in this case."

There is no authority for a magistrate trying a summary conviction matter, such as a charge of selling intoxicants to an Indian, to take a view of the *locus in quo* during an adjournment of the trial, as he himself stated in delivering his judgment finding the accused guilty; and where he did this *suo moto* and without notice to the parties or their counsel, it constitutes such an inherent defect in the course of legal procedure that the conviction is voided, even though the course taken by the magistrate was with the best intention: *Re Sing Kee* (1901), 5 Can. Cr. Cas. 86, 8 B.C.R. 20. The objection goes to the jurisdiction and may be given effect to notwithstanding a general statutory provision against the removal of convictions for such offences by certiorari, which would, however, not constitute a bar to certiorari for want of jurisdiction: *Ibid*.

The theory that a view was not permissible at common law is strongly controverted by modern text-writers. Wigmore on Evidence, sec. 1164, says:—

"The inconvenience of adjourning Court until a view can be had, or of