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THE APPOINTMENT OF JUDGES—AND DELEGATION OF JUDICIAL DUTIES.

By the B. N. A. Act, s. 96, it is provided, that, "The Governor-General shall appoint the judges of the Superior, District, and County Courts, in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick." The effect of this enactment appears to be to repeal all pre-existing powers for appointing judges, and all prior enactments providing for the appointment of judges in any of the Courts named, and from and after the 1st July, 1867, to vest the sole power of appointment in His Excellency the Governor-General.

It will be noticed that the section is somewhat peculiarly worded, and the exception is of something which is apparently not included in the preceding part of the section, which is confined to judges of Superior, District, and County Courts. Division Courts and Surrogate and Probate Courts and Justices of the Peace are not included in the prior part of the section, and because they are not so included, the Province of Ontario claims and exercises the right to appoint judges of Surrogate Courts and Justices of the Peace and Police Magistrates in Ontario, and it might also, if it saw fit, appoint judges of Division Courts: see *Re Wilson* v. *McGuire*, 2 Ont. 118.

All courts and judges having jurisdiction in the various provinces at the time of Confederation continued to exist and exercise jurisdiction after the B. N. A. Act took effect; but it seems reasonably clear that any powers theretofore exercised or conferred by the former Parliament of Canada, in reference to the future appointment of judges, or the future delegation of judicial functions, necessarily came to an end if in conflict with any express provision of the B. N. A. Act. Any other interpretation

of that Act would lead to an apparent conflict of jurisdiction, as to the appointment of judges.

The effect of s. 96 therefore appears not only affirmative of the jurisdiction of His Excellency the Governor-General to appoint judges of the courts referred to in that section, but also exclusive or extinctive of any other jurisdiction so to do.

At the time of Confederation certain statutes of the former Parliament of Canada were in force in Ontario, whereby authority was given enabling judicial powers to be conferred on persons who were not judges, *e.g.*, C.S.U.C., c. 11, s. 2, enabled commissions of assize to be issued to judges of the County Court and any of Her Majesty's Counsel learned in the law of the Upper Canada Bar; and 29-30 Vict., c. 391, which enabled sittings of the Court of Chancery to be held by "any one of Her Majesty's Counsel learned in the law of the Upper Canada Bar upon such counsel being requested by the Chancellor or one of the Vice-Chancellors to attend for the purpose; and such counsel while holding such sitting shall possess, exercise and enjoy all the powers and authorities of a judge of the said Court," and his decision was to be subject to appeal.

But these powers granted by the former Parliament of the Province of Canada seem to have come to an end on the passing of the B.N.A. Act for this reason; it is obvious that the Parliament of the Province of Canada on Confederation taking effect, ceased to have any power to appoint judges, or to confer judicial power—and it therefore seems to follow that if it could not itself exercise a power to appoint a judge neither could any person to whom it had delegated such power do so. The appointment of a person to act as a judge for a temporary purpose is none the less an appointment of a judge, and though his jurisdiction may be limited both as to time and duties, yet within those limitations he is to all intents and purposes a judge.

The commissions of assize referred to in C.S.U.C., c. 11, s. 2, were formerly issuable by the Crown as represented by the Governor-General of the former Province of Canada. But the right to issue commissions of assize as was determined in *Reg* v.

Amer, 42 U.C.Q.B. 391, is a prerogative right, and in that case a commission issued by the Deputy Governor-General of the Dominion was upheld; but the court declined to say whether or not a similar commission issued by the Lieutenant-Governor would be valid. The reporter adds a semble to his head note, to the effect that it would; but it seems to us the semble is not well founded, at all events, if the commission purported to empower persons who were not duly appointed judges by the Governor-General, to act as judges. For the trial of the Biddulph murder case commissions were issued both by the Governor-General and the Lieutenant-Governor.

The power conferred by C.S.U.C., c. 11, s. 2, to appoint temporary judges of assize it seems to us can now only be exercised by the Crown as represented by the Governor-General, to hold otherwise is virtually to create an exception to s. 96 of the B.N.A. Act.

In like manner the power formerly conferred on the Chancery judges to appoint a Queen's Counsel to hold sittings of the Court of Chancery would seem to have come to an end at the passing of the B. N. A. Act, because the Parliament which conferred it having become defunct, and being no longer able itself to exercise the power, neither could its delegates do so, otherwise it could be in effect perpetuating its authority after it had ceased to exist and after its authority had been transferred to some other functionary. If, for instance, the Parliament of the former Province of Canada had conferred on the judges of the Court of Chancery power to appoint judges to that Court as often as vacancies occurred, could it be pretended that such power could now be exercised? Surely not. Can it make any difference because the power they had was merely to appoint temporary judges?

The Ontario Legislature, however, appears to have thought otherwise, and it has not only introduced the provisions of C.S.U.C., c. 11, and 29-30 Vict., c. 39, into the Provincial Statute Book, but has also from time to time supplemented them with similar legislation: see 37 Vict., c. 7, s. 36, and has purported

to empower not only Queen's Counsel but retired judges of any of the Superior Courts to hold sittings of assize and nisi prius and oyer and terminer and general gaol delivery, upon being requested by any of the chief justices or judges of the Superior Courts so to do. And by s. 28 a retired judge as well as a Queen's Counsel was empowered to hold sittings of the Court of Chancery, on the request of the Chancellor or either of the Vice-Chancellors, and judicial powers were purported to be conferred on such retired judge or Queen's Counsel so holding a sitting.

These or similar provisions were perpetuated in the Ont. Jud. Act, R.S.O. (1897), c. 51, ss. 10, 11, 188, and they are continued in the revised Judicature Act recently passed.

With all due respect, we think this is a mistake. We have, we submit, given very sufficient reasons why the right of both retired judges, and King's Counsel, to act as judges under authority purported to be conferred by pre-Confederation statutes or by Ontario statutes, is open to the gravest doubt; and suitors ought not to be exposed to the dilemma of having either to admit a jurisdiction which is to say the least doubtful, or to be put to the expense of contesting it. Such a matter as the jurisdiction of the person assuming to act as judge ought to be removed from the realm of controversy.

This subject was very carefully considered in 1905 by a Committee of the Law Society whose report is to be found in vol. 4 of the proceedings of Convocation, p. 51 et seq. The conclusions of the committee, we think, in the main agree with what has been heretofore stated, at the same time, it must be admitted, hardly with that definiteness which could be wished. With regard to the legislation authorising the appointment of K.C.C., to act as judges, the committee made no suggestion, but they seem to stand on a similar footing to retired judges. With regard to retired judges the committee recommend that the Attorney-General of Ontario should introduce legislation to repeal every statutory duty assumed to be assigned to a retired

judge and in support of that suggestion referred to *Wilson* v. *McGuire; Gibson* v. *McDonald*, supra.

In view of what has been said, we venture to think the Provincial Government if it seriously intends to maintain its right to pass Acts such as we have referred to, should in some way obtain an authoritative pronouncement of the Supreme Court of Canada as to the validity of the Provincial enactments we have called in question, or if it does not intend to maintain that position it should repeal them, or suffer them to drop from the statute book as being obsolete or ultra vires.

The appointment of judges who were appointed by His Excellency judges of the High Court of Justice, to be judges of the Court of Appeal is assumed to be within the power of the Provincial Legislature; but if it may appoint a judge of the High Court to be a judge of the Court of Appeal, why may it not also appoint a County Court judge to be a judge of the Court of Appeal? It has in fact assumed to appoint all County Court Judges to be local judges of the High Court: Ont. Jud. Act, s. 185. Is not all this a trenching on the powers of His Excellency? see *Gibson* v. *McDonald*, 7 Ont. 401. It may possibly be that the commission of these judges may also entitle them so to act, and if so this would be a sufficient authority even though s. 185 were ultra vires. It is also assumed that the local Legislature has power to authorise the appointment of ad hoc judges to the Court of Appeal the legality of which also seems extremely doubtful, although the authority so conferred has been many times acted on.

If the question of the right of such a judge to sit were ever called in question it might be held that the whole proceedings in which he took part by reason of the presence of such ad hoc judge was coram non judice. In order to prevent such questions from arising in the future, it may be necessary in some way to give proper legislative authority to what has been done.

The constitution of the Railway and Municipal Board and the appointment of Drainage Referees, a Mining Commissioner and a Municipal Arbitrator to do what is strictly judicial work

withdraws from the ordinary courts a very large volume of business, and it is hard to see where a line is to be drawn which would prevent all civil business from being withdrawn from the courts referred to in s. 96 of the B. N. A. Act and transferred to new tribunals which are neither Superior or County Courts, and presided over by judges appointed and paid by the Province. This, in effect, was what was attempted to be done by the Province of Quebec; but the Provincial Legislation was disallowed as being a violation of the B. N. A. Act: see 21 Ont., p. 172-3.

THE CHAIRMAN OF THE DOMINION RAILWAY BOARD.

In a recent number of a legal contemporary there is an article criticising a ruling of the Board in reference to an application by the City of Toronto to change some rates imposed by the Bell Telephone Company. The writer of the article referred to finds it "extremely difficult to understand" how the decision was arrived at. He does not say, however, whether he heard the evidence and the arguments before the Board or the reasons given for the result arrived at. Being ourselves in the same position we do not pretend to say whether the critic or the Board was in the right of it. We do, however, propose to say something as to other observations in the article referred to.

The writer very properly eulogises the good work done by the late Judge Mabee, though it is scarcely fair to the eminent men who preceded him to say that the high position attained by this tribunal was due to *his* Chairmanship; nor, as the writer appears to hint, that it partly attained this eminence by giving decisions oftenest adverse to corporations. It will be seen, however, that these encomiums are really for the purpose of drawing a comparison between the previous Chairman of the Board and the present one, to the disadvantage of the latter. And so the writer thinks "it would be a pity if (by Mr. Drayton's action on the application referred to) the standard set up by

the Dominion Board up to the present should be lowered and that it should descend to the level at times reached by its prototype of Ontario."

Now as to the criticism on Mr. Drayton's action. It will scarcely be credited that a legal journal could take the ground of objection that the *Canadian Law Times* does. It appears that Mr. Drayton declined to sit on this application because he had been concerned in the matter as Corporation Counsel for the City of Toronto and had given an opinion thereon to his then clients. It is surely unnecessary to say that Mr. Drayton simply did what any professional man would have done under similar circumstances, viz., he declined to sit on the case for the reason stated. This is a proposition in professional ethics so simple as to be obvious to anyone, be he lawyer or layman. But here we have a legal journal finding fault with this most commendable and proper action, for his doing otherwise than he did would have been a gross breach of the obviously proper rule and the universal practice obtaining under similar circumstances.

We notice that even a lay journal (*Ottawa Evening Journal*) takes this ground and it may be interesting to quote its words:—

"The value of this criticism may be judged in part from the fact that Mr. Drayton is specially blamed by the Toronto publication because he has refrained from taking part in the hearing of or decisions in disputes between Toronto and certain public-service corporations. Mr. Drayton's reason for refraining is that he was the Toronto city solicitor prior to becoming Chairman of the Railway Commission. As city solicitor, he, of course, committed himself to the city side. What sort of an umpire of such cases would he be accepted as now? The *Law Times* is silly. The fact is, so the Journal believes, and this is a good time to say it, the Railway Commission never stood higher in public estimation. Mr. Drayton has more than 'made good.' And Mr. Scott, the Assistant Chief Commissioner, has always, through his ability, fairness and public spirit, been a strength to the Board not perhaps fully realised by the public.

At any rate, the conclusion indicated by ordinary observation is that the Dominion Railway Commission has never been doing better work than recently."

As to the standing of the Board as at present constituted, we concur with the above observations. During the short period that Mr. Drayton has been Chairman, he has shewn ability to quickly master the details of an intricate subject. His opinions have been judicial, and have, in the main, commended themselves to all parties interested. It is, of course, not to be expected that a new member of the Board could, in a few months, attain the position of those who have preceded him who, moreover, had a previous judicial training, but there is every reason to believe that Mr. Drayton will be equal to the best traditions of the position he now occupies.

THE EFFECT OF AN EXECUTOR'S ASSENT.

The decision in the recent case of *Attenborough* v. *Solomon*, 107 L.T. Rep. 833; (1913) A.C. 76, and the dicta of Lord Haldane in the House of Lords will, no doubt, have the effect of calling attention to the inherent vulnerability of titles taken from executors, and the risks run by purchasers and mortgagees in dealing with an executor. These risks have always existed, whether the property sold or mortgaged be chattels personal (commonly spoken of as chattels), or chattels real, or real estate —for now real estate with certain exceptions may be said to stand on the same footing as chattels real, so far as regards the point under consideration. The recent decision, and perhaps particularly the dicta of the Lord Chancellor, may be a little disturbing, but they have not effected any alteration in the law.

The inherent vulnerability referred to above arises from the principle of law—and it is important to observe that it is a principle of law and not one of equity—that on the executor's assent the property vests in the legatee. It is not within the scope of this article to enter into a minute examination of the occasions, on the one hand, where an assent has been held to

have occurred, and those, on the other hand, where the courts have refused to recognise a purported or alleged assent; but it is desirable to remind the reader, first, that an assent need not be evidenced by writing, nor need it be express; and, secondly, that it is not a condition precedent for the validity of an assent that possession of the property must pass on the assent being given.

It is said in Touchstone that certain words of congratulation used by an executor to the legatee will have the effect of an assent: Shep. Touch. 456. Candidly, we doubt this, although Dodderidge, probably the real author of that ancient work, was a very learned judge. But there are numerous authorities which shew assent may not only be verbal, but implied from conduct. "The principle established," said Chief Justice Gibbs, delivering a considered judgment in *Doe* v. *Sturges* (1816), 7 Taunt, 217, at p. 223, "is that if an executor in his manner of administering the property does any act which shews that he has assented to the legacy, that shall be taken as evidence of his assent to the legacy; but if his acts are referable to his character as executor, they are not evidence of an assent to the legacy."

Secondly, assent is not necessarily accompanied by a change of possession. It was held that there had been an assent where the executor had informed the legatee that the legacy lay ready for him when he would call for it (*Camden* v. *Turner*, cited by Mr. Justice Buller in *Hawkes* v. *Saunders* (1872), 1 Cowp. 289, at p. 293); and where the executor had in the case of a legacy of leaseholds paid the ground rent and charged the same in account against the legatee: *Doe* v. *Mabberley*, 6 Car. & P. 126. In the recent case an assent was implied although the executor still retained exclusive possession of the piece of plate in question.

The point which was especially dwelt upon by Lord Haldane in his judgment in *Attenborough* v. *Solomon*, 107 L.T. Rep. 833; (1913) A.C. 76, is the rule of law that on the executor's assent the property vests in law in the legatee. This point is not, as we have already said, a new one. As regards chattels personal—*i.e.*, chattels in the common acceptance of the term

—the cases are clear. "It never could be doubted," said Lord Ellenborough in *Doe* v. *Guy* (1802), 3 East, 120, at p. 123, "but that at law the interest in any specific thing bequeathed vests in the legatee upon the assent of the executor." The report of *Barton's* case (1677), Freem. K.B. 289, states authoritatively that "when a certain thing as a horse or a cow is devised, as soon as the executor assents the property vests in the legatee, and he may have an action at common law for the recovery of the thing."

So much for chattels personal. Is there any distinction between them and chattels real, such as leaseholds? For our purposes there is none. On the assent of the executor to a gift of leaseholds the legatee acquires the legal interest in the legacy. In the words of Lord Ellenborough, it makes no difference whether the bequest be of a personal or a real chattel: *Doe* v. *Guy*, sup., at p. 123. To cite a more recent authority, Mr. Justice Kekewich in *Re Culverhouse; Cook* v. *Culverhouse*, 74 L.T. Rep. 347; (1896), 2 Ch. 251, holding that specifically bequeathed leaseholds vested absolutely in the legatee on the executor's assent, made the following observation: "It is an exception from the general law that a man requires, in order to complete his title, something in the nature of a conveyance." Lord St. Leonards was fully aware of the risk involved in taking an assignment of leaseholds from an executor, for he advised that this could not be safely done without the concurrence of the legatee for fear of there having been a previous assent to the bequest: see 2 Sug. V. & P., 9th ed., p. 56.

As regards realty, other than land of copyhold or customary tenure, the Land Transfer Act, 1897, now provides that a deceased person's real estate shall vest on death in his personal representatives as if it were a chattel real notwithstanding any testamentary dispositions: s. 1 (1). The second sub-section of s. 2 provides that all rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealings with chattels real before probate or administration, and other matters in relation to the administra-

tion of personal estate, and the powers, rights, duties and liabilities of personal representatives in respect of personal estate, shall apply to real estate, so far as applicable, as if that real estate were a chattel real vesting in the personal representatives. Subject to those powers, rights, duties, and liabilities, the personal representatives hold the real estate as trustees for the persons by law beneficially entitled: s. 2 (1). What is of particular importance for our purposes is the provision that at any time after the death of the owner of any land his personal representatives may *assent* to any devise contained in his will; and on such assent all liabilities of the personal representatives in respect of the land are to cease, except as to any acts done or contracts entered into by them before such assent: s. 3 (1).

Thus the vulnerability of titles to chattels personal and chattels real derived from executors due to a possible previous assent on the part of the executor is extended to specifically devised realty, so that the purchaser of real estate from executors may find himself deprived of the legal estate by a previous assent. This may be an argument for the compulsory registration of titles to land, but it appears to be a much more potent one for amending legislation doing away with the passing of the legal estate on a verbal or implied assent. Fortunately such legislation is in fact in contemplation.

Such, then, being the law as regards the effect of the executor's assent, the question arises whether there are any principles which protect purchasers and mortgagees taking a title to chattels, leaseholds, or freeholds from an executor.

There are certain highly convenient rules designed for the protection of persons dealing with executors. "Where a person," said Mr. Justice Stirling in *Re Venn and Furze's Contract*, 70 L.H. Rep. 312; (1894), 2 Ch. 101, at p. 114, "who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shews the contrary." "A mortgagee or purchaser," said Vice-Chancellor Leach in *Wat-*

kins v. *Check* (1825), 2 Sim. & St. 199, at p. 205, "from the executor of a part of the personal property of the testator has a right of infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies."

Although prior to the Land Transfer Act, 1897, realty did not devolve on the executors, yet if the land was devised to executors charged with debts there was an implied power of sale for the purpose of raising the debts. In such a case as this a purchaser from the executor could not insist on proof that debts remained to be paid. He had to assume it; and unless he had notice to the contrary he was amply protected, unless the sale was more than twenty years after the testator's death, in which case he was put on inquiry: see *Re Tanqueray-Willaume and Landau*, 46 L.T. Rep. 542; 20 Ch. Div. 465. Again, in purchasing from an executor leaseholds specifically bequeathed, the purchaser is entitled to assume that the executor is selling for the purpose of administration, as *e.g.*, for the purposes of raising money to pay the debts and expenses incurred in the administration. He cannot compel the executor to answer a requisition whether any debts remain to be paid: *Re Whistler*, 57 L.T. Rep. 77; 35 Ch. Div. 561; and the fact that twenty years have elapsed since the testator's death does not alter the position: *Ibid.; Re Venn and Furze's Contract*, sup.

These convenient rules, however, do not touch the question of assent. If an assent has in fact been given before the executor purports to deal with the subject-matter of the bequest or devise by sale or mortgage to a third party, the title of that third party is defective. Property in the subject-matter of the bequest—the legal estate, in the case of realty—passed from the executor on the assent, and any subsequent purported dispostion must necessarily be ineffectual, for Memo dat quod non habet.

Third parties dealing with personal representatives may, however, be consoled by the following reflections: That the implied assents (the most dangerous of all) are not, as a rule, con-

sistent with the retention thereafter by the executor of the subject-matter of the bequest; that, as is shown by such a case as *Thorne* v. *Thorne*, 69 L.T. Rep. 378; (1893), 3 Ch. 196, the court will not readily extend the doctrine of implied assent; that as regards realty, an express assent when in writing is a document of title, and so must be disclosed by the abstract; and, lastly, that the mischief of verbal assents in the case of realty will soon be remedied by statute.—*Law Times*.

"MAY" READ AS "MUST."

The primary and natural meaning of the word "may" is permissive and enabling only. Of that there cannot be the slightest doubt; "though dicta of eminent judges may be cited to the contrary," as was remarked by Lord Selborne in *Julius* v. *Bishop of Oxford*, 42 L.T. Rep. 546; 5 App. Cas. 214, at p. 235. It "can never mean 'must' so long as the English language retains its meaning," to quote the statement made by Lord Justice Cotton in *Re Baker; Nichols* v. *Baker*, 62 L.T. Rep. 817; 44 Ch. Div. 262, at p. 270. Where it has been held to be used in the sense of imposing an obligatory duty—directory and not merely discretionary—it is because a power having been conferred by the word "may" it becomes a duty to exercise it. That is to say, where it is essential to treat the word as imperative for the purpose of giving full effect to a legal right. And there are many cases in which such has been the judicial interpretation arrived at. The most recent of them is that of *Rex* v. *Mitchell*, 108 L.T. Rep. 76, decided by the Divisional Court, consisting of Justices Ridl ., Coleridge, and Bankes. It related to a person who was charged witl an offence under the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict., c. 86. Mr. Justice Ridley was of opinion that the word "may" in the phrase of s. 9 of that Act, "the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence," ought to be interpreted as being used in a discretionary and enabling and not in an imperative sense. The majority of the learned judges, however, took a contrary

view, holding that, although the words of the section are "may deal" and not "must deal," the court of summary jurisdiction is bound to treat an offence as an indictable one if the accused objects to being tried by that court, and cannot deal with it as punishable on summary conviction. The case was admittedly a somewhat difficult one, and much, perhaps, there is to be said in favour of either conclusion. A divergence of opinion is, therefore, no matter for great surprise. But if the legal right which an accused person possesses under the section of objecting to being tried by a court of summary jurisdiction—demanding instead to be sent for trial by a jury—is capable of being completely frustrated by the court exercising a discretionary power antagonistic to that right, it becomes practically worthless. This can scarcely have been the intention of the Legislature. Though why the word "may" was used in place of "shall" is not easy to explain if the right to claim a trial by jury was meant to be inherent. Discretion, however judicially exercised, which can balk the accused of his desire reduces the statutory authorisation to a mere nullity. The present case seems, therefore, to be a signal example of that class of case where it is necessary to treat the word "may" as compulsory, inasmuch as, if not, a legal right might be clearly defeated. It lies, of course, upon those who contend that an obligation exists to exercise the faculty or power conferred by the word "may" to show, in the circumstances of the case, something which creates an obligation. This was pointed out by Lord Cairns in *Julius* v. *Bishop of Oxford* (ubi sup.). Then the word which, in its ordinary meaning, is merely potential, becomes imperative. For where, as in the present case, the object of the power is to enable the justices on whom it is conferred to effectuate a legal right, they can have no option in the matter. It must be their duty to exercise the power when called upon to do so. The opportunity of taking advantage of the legal right might otherwise be lost to the accused. The existence of the general principle was as fully recognised by Mr. Justice Ridley as by his learned colleagues. But in the application thereof to

the present case was where their Lordships differed. Mr. Justice Ridley's observation, however, that "if it had been intended to give to the accused person the right to claim to be tried before a jury the Act might easily have said so in definite language," unfortunately carries no weight. Reference to the authorities collated, and analysed with masterly skill, in Stroud's Judicial Dictionary under the title "May" shews how frequently such a simple course has been ignored.—*Law Times.*

THE TRUE THEORY OF THE COMMON LAW.—"In all sciences, says Lord Bacon, they are the soundest that keep close to particulars. Indeed, a science appears to be best formed into a system by a number of instances drawn from observation and experience, and reduced gradually into general rules; still subject, however, to the successive improvements, which future observation or experience may suggest to be proper. The natural progress of the human mind, in the acquisition of knowledge, is from particular facts to general principles. This progress is familiar to all in the business of life; it is the only one, by which real discoveries have been made in philosophy; and it is the one, which has directed and superintended the instauration of the common law. In this view, common law, like natural philosophy, when properly studied, is a science founded on experiment. The latter is improved and established by carefully and wisely attending to the phenomena of the material world; the former by attending, in the same manner, to those of man and society. Hence, in both, the most regular and undeviating principles will be found, on accurate investigation, to guide and control the more diversified and disjointed appearances."

Lord Coke says, "Reason is the life of the law, nay, the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason; for, Nemo nascitur artifex. This legall reason is summa ratio. And therefore if all the reason that is dispersed into so many severall heads were united unto one, yet could he not make such a law as the law of England is."

REVIEW OF CURRENT ENGLISH CASES.

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SHIP—BILL OF LADING—EXEMPTION FROM LIABILITY—FIRE—PERILS OF ICE—DANGEROUS CARGO—DEFECTIVE STORAGE—STORAGE RENDERING VESSEL UNSEAWORTHY—WARRANTY OF SEAWORTHINESS—MAINTENANCE OF VESSEL'S CLASS—MERCHANT SHIPPING ACT, 1894 (57-58 VICT., c. 60) s. 502.

Ingram v. *Services Maritime* (1913) 1 K.B. 538. This was an action against ship owners for the loss of cargo. The plaintiffs shipped the goods in question to be carried from Le Trèport to London on board the defendant's ship on the terms of a bill of lading which contained the following exemptions from liability: (1) Fire on board . . . and all accidents, loss, and damage whatsoever from . . . the perils of the seas . . . or from any act, neglect or default whatsoever of the master, officers, crew, stevedores, servants, or agents of the owners . . . in the management, loading, storing . . . or otherwise . . . "(11) It is agreed that the maintenance by the shipowners of the vessel's class . . . shall be considered a fulfilment of every duty, warranty, or obligation whether before or after the commencement of the voyage." By s. 502 of the Merchants Shipping Act, 1894, it is provided that the owners of a British sea-going ship is not liable to make good any loss or damage happening without his actual default or privity where any goods or other things put on board his ship are lost or damaged by reason of fire on board the ship. In addition to the plaintiffs' goods the defendants took on board at Le Trèport, a quantity of sodium saturated with petrol—which was insecurely and insufficiently packed. This was stowed upon the deck and the vessel encountering rough weather the packages got loose and were damaged, and water got to the sodium which produced fire and explosions which set fire to the ship and caused its total loss. The defendants denied liability for the loss of the plaintiffs' goods claiming to be protected from liability both under the statute and the clauses of the bill of lading above referred to. Scrutton, J., who tried the action, held that the bill of lading having made express provision for loss by fire the provision of the statute was thereby excluded, and afforded the defendants no defence. And under

the terms of the bill of lading he held that the defendants were liable, because they did not exempt defendants from liability for unseaworthiness and the implied warranty of seaworthiness had been broken by the way in which the sodium had been packed and stowed—that the clause in the bill of lading as to non-liability for negligence in stowing only applied where the ship was seaworthy, and ample meaning was given to it by restricting it to negligent stowage causing damage to the cargo, but not rendering the ship unseaworthy. And he held that the clause as to the maintenance by the ship-owners of the vessel's class, was too vague to relieve the defendants from their implied warranty of seaworthiness. He therefore held that notwithstanding the terms of the bill of lading and the statute, the defendants were liable for the loss of the plaintiffs' goods.

CRIMINAL LAW—"SECOND OR SUBSEQUENT CONVICTION"—ADDITIONAL PUNISHMENT IMPOSED BY STATUTE FOR SECOND OFFENCE AFTER FIRST, BUT BEFORE SECOND CONVICTION.

The King v. *Austin* (1913) 1 K.B. 551, is an instance of the care with which criminal law is administered in England. The defendant had been convicted as a rogue and vagabond for living on the earnings of prostitutes. After his conviction an Act was passed providing that persons on a second conviction for such an offence should be subject to whipping. The defendant was so convicted for a second offence after the Act and sentenced by Darling, J., to be whipped, but the learned judge appears to have required the question whether the defendant was liable to be whipped to be argued, which was accordingly done by counsel instructed by the Registrar of the Court of Criminal Appeal. The Court of Criminal Appeal (Ridley, Phillimore, and Avory, JJ.) held that the Act imposing the additional punishment applied to the case of a second conviction after it came into force notwithstanding the prior conviction took place prior to the passing of the Act. As the court says, "No man has such a vested interest in his past crimes and their consequences as would entitle him to insist that in no future legislation shall any regard whatsoever be had to his previous history." The sentence was therefore affirmed.

STATUTE—CONSTRUCTION "MAY" EQUIVALENT TO "MUST."

The King v. *Mitchell* (1913) 1 K.B. 561. In this case the defendant was accused before magistrates of an offence under

an Act for which a penalty amounting to £20 and imprisonment was imposed. By statute a person so accused may, on appearing before a court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction "may" deal with the case in all respects as if the accused were charged with an indictable offence and not an act punishable on summary conviction. The defendant objected to being tried by the magistrates, but they nevertheless proceeded to try the case, and convicted him. On appeal the majority of the Court of Criminal Appeal (Lord Coleridge and Bankes, JJ.) held that this was wrong, and that "may" meant "must." Ridley, J., however, dissented and thought it was merely permissive.

LEASE—ASSIGNEE OF REVERSION—CLAIM BY LESSEE AGAINST LESSOR FOR DAMAGES FOR BREACH OF CONTRACT—ACTION FOR RENT BY ASSIGNEE OF REVERSION—SET-OFF BY LESSEE.

Reeves v. *Pope* (1913) 1 K.B. 637. This was an action by the mortgagees of the reversion of a lease to recover rent, and the defendant claimed to be entitled to set off a claim for damages which she had against her lessors, in the following circumstances. The London and North-eastern Estates Company, being lessees for a term of 99 years, agreed to erect a hotel on the premises by 25th March, 1911, of which the defendant agreed to become lessee. The defendant failed to erect the hotel by the day named, and it was not ready for occupation until November 13, 1911, on which date the defendant accepted a lease for 28 years at the agreed rent but without prejudice to her clai: for damages for the non-completion of the hotel as agreed. On the 16th November, 1911, the company assigned its lease of ninety-nine years for the whole term less three days by way of mortgage to the plaintiffs who had notice of the defendant's claim. The defendant's claim to set off was attempted to be supported under the provisions of the Judicature Act relating to assignments of choses in action; but Bankes, J., held that they had no application, as the claim of the plaintiffs was founded on their legal title as assignees of the reversion, and as such they could have distrained for the rent, and as if they had done so, the defendants could not have maintained any right of set-off in answer to the distress, so he considered they might also sue for the rent without subjecting themselves to any liability to such set-off.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lord Chancellor Haldane, Lords Macnaghten, Atkinson, and Moulton.] [Jan. 31.

THE KING AND ANOTHER *v.* ROYAL BANK OF CANADA AND OTHERS.

British North America Act, 1867, (30 & 31 *Vict.*, *c.* 3, *ss.* 91, 92—*Powers of Provincial Government—Statute dealing with civil rights outside province—Ultra vires.*

On appeal from the Supreme Court of Alberta.

The principle that money, in the hands of one person, which in justice and equity belongs to another, may be recovered as money had and received to the use of the true owner applies to money paid for a consideration which has failed.

Therefore, where bondholders in London had advanced money for the construction of a railway, which scheme had become abortive, and the money was lying at a bank in Alberta:

Held, that the Provincial Legislature had no power to pass a statute dealing with such money, the right of the bondholders to recover it being a civil right outside the province, and not within the powers conferred on the Provincial Legislature by s. 92 of the British North America Act, 1867.

Judgment of the court below reversed.

Their Lordships said they were "not concerned with the merits of the political controversy which gave rise to the statute the validity of which is impeached. What they have to decide is the question whether it was within the power of the Legislature of the province to pass the Act of 1910. They agree with the contention of the respondents that in a case such as this it was in the power of that Legislature to repeal subsequently any Act which it had passed. If this were the only question raised the appeal could be disposed of without difficulty. But the Act under consideration does more than modify existing legislation. It purports to appropriate to the province the balance standing at the special accounts in the banks, and so to change the posi-

tion under the scheme to carry out which the bondholders had subscribed their money."

Buckmaster, K.C., *Martin*, K.C., and *Geoffrey Lawrence*, for the plaintiffs, respondents. *Sir R. Finlay*, K.C., *R. B. Bennett*, K.C., *J. H. Moss*, K.C., and *W. Finlay*, for the defendants, appellants.

Province of Ontario.

COURT OF APPEAL.

Hodgins, J.A.] [March 1.

FAIRWEATHER *v.* CANADIAN GENERAL ELECTRIC CO.

(10 D.L.R. 130.)

Master and servant—Liability of master—Whether employee was within sphere of duties—Safety as to place and appliances—Servant's assumption of risks—Knowledge of defect—Evidence—Weight and efficiency—Negligence imperiling employee.

A foreman in charge of an electric power-house is acting within the sphere of his employment when he himself does or assists in doing necessary work which ordinarily would be done by others under his charge upon whom he had the right to call, unless it is shewn that his authority was limited by his employer to the requisitioning of help in such cases.

Barnes v. *Nunnery Colliery Co.*, [1912] A.C. 44, and *Whitehead* v. *Reader*, [1901] 2 K.B. 48, referred to.

It is the duty of the employer to provide proper appliances for the employees and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk.

Smith v. *Baker*, [1891] A.C. 325, applied; *Schwab* v. *Michigan Central R. Co.*, 9 O.L.R. 86, and *Can. Woollen Mills* v. *Traplin*, 35 Can. S.C.R. 424, referred to.

Neither the employee's knowledge of a defect in the condition of the works due to the employer's negligence, nor the continuance in the employment, is conclusive evidence of willingness on the part of the employee to incur the risk.

Church v. *Appleby,* 60 L.T. N.S. 542; *Yarmouth* v. *France,* 19 Q.B.D. 647; *Smith* v. *Baker,* [1891] A.C. 325; *Williams* v. *Birmingham Battery Co.,* [1899] 2 Q.B. 338; *Grand Trunk Pacific R. Co.* v. *Brulott,* 46 Can. S.C.R. 629, 13 Can. Ry. Cas. 95, referred to.

When a workman in the course of his employment is placed in a position of peril by the negligence of his master in the construction of the works and ways of the master, and an accident happens to the workman in the way that might be expected from the negligence found, a jury can infer that the negligence caused the accident.

McKeand v. *C.P.R.,* 1 O.W.N. 1059, 2 O.W.N. 812, referred to.

E. G. Porter, K.C., for plaintiff. *G. H. Watson,* K.C., and *L. M. Hayes, K.C.,* for the defendants.

Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ.] [March 18.

MILLER *v.* HAND (No. 2.).

(10 D.L.R. 186.)

Brokers—Real estate agent's purchase in own name—Liability to account for profits.

An agent selling land cannot make a profit for himself at the expense of his principal; and so if the agent fraudulently purchases the land himself, and afterwards makes a profit on the re-sale he is accountable to his principal for the amount of his profit less the commission on such profit.

Miller v. *Hand* (No. 1), 8 D.L.R. 465, affirmed on appeal.

Watson, K.C., for defendant. *Kilmer,* K.C., for plaintiff.

Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ.] [March 19.

GRAHAM CO. *v.* CANADA BROKERAGE CO.

(10 D.L.R. 107.)

Sale—Tender of second sample—Refusal to inspect.

The buyer is not entitled to withdraw from his contract on the ground that one box of merchandise (*ex gr.,* evaporated apples),

forwarded as a sample was not satisfactory, where the contract of sale contained a stipulation that it was "subject to the approval of fire boxes, when ready for shipment"; the buyer must still inspect and pass upon a shipment of five boxes forwarded for the approval of the buyer in accordance with the terms of the contract and if the buyer refuses even to inspect these shipments, on the ground that the rejection of the one box operated as a termination of the contract, the seller may re-sell the goods and recover damages.

Borrowman v. *Free*, 4 Q.B.D. 500, applied.

Shirley Denison, for defendants. *M. Wright* and *W. D. M. Shorey*, for plaintiffs.

Middleton, J.] [March 20.

NIAGARA AND ONTARIO CONSTRUCTION CO. *v.* WYSE AND UNITED STATES FIDELITY AND GUARANTY CO.

(10 D.L.R. 116.)

Bond for indemnity and security—Contractor's bond—Principal and surety—Waiver of claims—Release of surety—Rights and remedies of a surety—Credit for allowances waived—Contractor's bond—Advances to assist completion of contract.

Where a guaranty company entered into a bond which was conditioned that a sub-contractor would "well and faithfully in all respects perform, execute and carry out the said contract," and recited that annexed to the bond was a copy of the contract in question, which, however, did not contain some slight alterations made on the final revision of the contract as re-executed by the parties after the date of the bond, the guaranty company are not relieved from liability if the words inserted do not alter the meaning of the contract in any way, since the guaranty company was not prejudiced by an immaterial alteration.

Tolhurst v. *Portland Cement Manufacturers*, [1903] A.C. 422; *Harrison* v. *Seymour*, L.R. 1 C.P. 518; *Croydon, etc., Co.* v. *Dickinson*, 2 C.P.D. 46, referred to.

A waiver of a claim for damages which may arise out of delays or interruptions in the performance of a contract does not constitute any material change in the contractual obliga-

tions of the parties, or enlarge the liabilities of the surety, so as to operate as a discharge of the contractor's surety.

Where a person under bond for the performance of work waives any claim for an allowance arising out of the contract, his surety will be entitled, on the taking of the accounts, to credit for the amount voluntarily released.

Where a sub-contractor has completed his work and performed his contract with the assistance of advances made him by his head contractor, the latter cannot recover these advances from the surety of the sub-contractor who entered into a bond conditioned for the due performance of the work, such being beyond the conditions expressed in the bond; if, however, the head contractor had completed the work on his own account upon the sub-contractor's default and charged the cost thereof against the sub-contractor deducting from this amount the sums due under the contract, the surety would still be liable, provided notice as required by the contract had been duly given to the surety.

Cadwell v. *Campeau*, 3 D.L.R. 555, referred to.

W. N. Tilley, and *A. W. Ballantyne*, for plaintiffs. *R. McKay*, K.C., and *W. B. Milliken*, for defendants.

Wyse appeared in person.

Meredith, C.J.C.P.] [March 26.

SCOTT *v.* GOVERNORS OF UNIVERSITY OF TORONTO.

(10 D.L.R. 154.)

Workmen's Compensation Act—Negligence—When contributory negligence a defence—Degree of care—Master and servant—Employers' liability—Common employment—Common law—Change of rule by workmen's compensation enactments.

In actions for damages for injuries under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, the plaintiff cannot be proved guilty of contributory negligence by proving only that he could have avoided the accident; it must be shewn that he could have avoided it by the exercise of such care as persons acting in the like capacity and under similar circumstances ordinarily would have exercised.

Although an employer is not liable at common law for injuries to an employee sustained by reason of the negligent act of a foreman, if the machinery supplied is proper and usual and

the employer has taken reasonable precautions to insure the safety of his employee; yet, under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, there may be liability in such cases, where the plaintiff (at the instance of a third party, employed by the defendants, to whose orders the plaintiff, in the same employment, was bound to conform) is required by such third party to do, and does, certain work in the doing of which the plaintiff is injured through such third party's negligence.

Dewart, K.C., for plaintiff. *Paterson*, K.C., for defendants.

Middleton, J.] [March 31.

BASHFORD *v.* PROVINCIAL STEEL CO.

(10 D.L.R. 187.)

Corporations and companies — Officers — Status of directors — Master and servant—Grounds for discharge of employee.

There is no legal incompatibility between the office of director of a company and any other office in the service of the company, for directors do not stand in the position of masters to the officers of the company, but are themselves the servants of the company. *King* v. *Tizzard*, 9 B. & C. 418, referred to.

There is no absolute legal rule as to what is a justification for the dismissal of an employee before his term of employment has expired; each case must stand on its own merits; lack of executive ability resulting in great financial loss to a company is sufficient to justify the dismissal of their general works manager.

Field, K.C., and *W. F. Kerr*, for plaintiff. *Johnston*, K.C. *McMaster* and *Keith*, for defendants.

Kelly, J.] [April 3.

ARMSTRONG CARTAGE CO. *v.* COUNTY OF PEEL.

(10 D.L.R. 169.)

Damages—Loss of profits as element of damage—Unreasonable delay in having repairs made—Highways—Liability of county for defective highway—Road taken over.

Where a chattel has been injured owing to a negligent act, the cost of repairing it, the difference in value between the

former worth and that of the chattel when repaired, and the damage sustained owing to the loss of use of the chattel while being repaired, are all recoverable, as damages, but damages are not recoverable for loss of the use of the chattel during the period of an unreasonable delay on the part of the owner in having the repairs made.

The "Greta Holme," [1897] A.C. 596, and *The "Argentino,"* 14 A.C. 519, referred to.

Where, under the Highway Improvement Act, 7 Edw. VII. (Ont.) ch. 16, as amended by 2 Geo. V. (Ont.) ch. 11, a county council has assumed highways in any municipality in the county in order to form or extend a system of county highways therein, the county is liable for the maintenance and repair of those roads, and for damages sustained by reason of the non-repair of any of them.

G. S. Kerr, K.C., and *G. C. Thomson,* for plaintiffs. *T. J. Blain,* and *D. O. Cameron,* for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [March 17.

GOLD MEDAL FURNITURE CO. *v.* STEPHENSON (No. 2).

(10 D.L.R. 1.)

Evidence—Husband and wife—Undue influence—Burden of proof—Liability of wife as surety—Independent advice—Change of position of parties—Guaranty—Wife as surety—Signing guaranty at husband's request.

In an action by a creditor of a limited liability company, upon a guarantee signed by a married woman, who was the secretary of, and a shareholder in the debtor company, the burden of proving undue influence in respect of her signature thereto obtained by her husband lies upon those who allege it.

Bank of Montreal v. *Stuart,* [1911] A.C. 120, followed; *Euclid Avenue Trust Co.* v. *Hohs,* 24 O.L.R. 447, referred to.

A creditor, without notice of any undue influence on the part of the husband in procuring his wife's signature to a security for the amount of an indebtedness due by a company of which the

wife was secretary and also a shareholder, given at the instance of the husband who was manager of the company, is not bound to see that she understood the document and had proper independent advice, particularly in a case where, in consideration of the delivery of the security, the creditor extended the time of credit to the debtor, advanced other goods and materially changed his position.

Gold Medal Furniture Co. v. *Stephenson* (No. 1), 7 D.L.R. 811, varied; *Chaplin* v. *Brammall,* [1908] 1 K.B. 233, doubted; *Bischoff's Trustees* v. *Frank,* 89 L.T. 188, and *Talbot* v. *Van Boris,* [1911] 1 K.B. 854, followed; *Turnbull* v. *Duval,* [1902] A.C. 429, distinguished.

In a transaction between a creditor and a limited liability company by which the indebtedness of the company was secured by a guaranty which was signed by a married woman at the request of her husband, the married woman cannot escape liability where it appears that she had a personal interest as the secretary and a shareholder in a company by pleading that she signed the guaranty at her husband's request without reading it over, where there was no misrepresentation and the creditor received it in good faith from the company as represented by the husband.

Bank of Montreal v. *Stuart,* [1911] A.C. 120, followed; *Chaplin* v. *Brammall,* [1908] 1 K.B. 233, doubted; *Gold Medal Furniture Co.* v. *Stephenson* (No. 1), 7 D.L.R. 811, varied.

D. H. Laird and *F. J. G. McArthur,* for plaintiffs. *C. P. Fullerton,* K.C., and *F. M. Burbidge,* for several defendants.

Province of British Columbia

COURT OF APPEAL.

REX *v.* CRAWFORD.

(10 D.L.R. 96.)

Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A.] [January 7.

Criminal law—Evidence—Demonstrative evidence—View by court—Magistrate—Summary trial by consent—"View" by magistrate.

A police magistrate sitting as such under Part 16 of the Criminal Code (1906), and summarily trying an indictable

offence, has no right during the trial to make a view of the land in respect of a transaction in which the charge of fraud was made which he was trying as such magistrate, at least where there is no consent of both the Crown and the accused to his so doing.

R. v. Petrie, 20 O.R. 317, applied.

Although s. 958 of the Criminal Code (1906) empowers the court to order that the jury on a criminal trial shall have a view of any place, person or thing, it is not to be inferred that a magistrate exercising a limited statutory power of summary trial without a jury in respect of certain indictable offences, may in like manner take a view of lands which are the subject matter of the offence charged.

D. W. F. McDonald, for defendant. *J. K. Kennedy*, for the magistrate.

ANNOTATION ON ABOVE CASE.

"Real evidence" is often produced at trials, when it is not exacted by any rule either of law or practice. Valuable evidence of this kind is sometimes given by means of accurate and verified models, or by what is technically termed a "view" i.e., a personal inspection by some of the jury of the *locus in quo*,—a proceeding allowed in certain cases by the common law, in criminal as well as in civil cases, and much extended by the statutes, 4 Anne, ch. 16, sec. 8; Juries Act (Imp.) 1825), 6 Geo. 4, ch. 50, sec. 23; Common Law Procedure Act, 1852 (Imp.), 15 and 16 Vict. ch. 76, sec. 114, and Common Law Procedure Act, 1854 (Imp.), 17 and 18 Vict. ch. 125, sec. 58. Best on Evid. 11th ed., 195; *R.* v. *Martin*, L.R. 1 C.C.R. 378, 12 Cox C.C. 204, 41 L.J.M.C. 113. The application for the view may be made at any time before verdict. *Ibid.;* Bowen-Rowlands on Crim. Proceedings, 2nd ed., 252.

Section 958 of the Criminal Code of Canada, 1906, is as follows:—

"On the trial of any person for an offence against this Act, the Court may, if it appears expedient for the ends of justice, at any time after the jurors have been sworn to try the case and before they give their verdict, direct that the jury shall have a view of any place, thing or person, and shall give directions as to the manner in which, and the persons by whom, the place, thing or person, shall be shewn to such jurors, and may for that purpose adjourn the trial, and the costs occasioned thereby shall be in the discretion of the Court.

"(2) When such view is ordered, the Court shall give such directions as seem requisite for the purpose of preventing undue communication with such jurors: Provided that no breach of any such directions shall affect the validity of the proceedings."

Taking a view of the locality of the offence is receiving evidence, in a sense, and the prisoner's counsel should have the opportunity of attending: *R.* v. *Petrie* (1890), 20 O.R. 317, 324. In that case the prisoner was

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, JJ.) 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

postponing the trial for the purpose, may suffice to overcome the advantages of a view, particularly when the nature of the issue or of the object to be viewed renders the view of small consequence. Accordingly, it is proper that the trial Court should have the right to grant or to refuse a view according to the requirements of the case in hand. In the earlier practice, the granting of a view seems to have become almost demandable as of course; but a sounder doctrine was introduced by the statute of Anne (which apparently only re-stated the correct common-law principle); so that the trial Court's discretion was given its proper control."

"That the Court is empowered to order such a view, in consequence of its ordinary common-law function, and irrespective of statutes conferring express power, is not only naturally to be inferred, but is clearly recognized in the precedents. Nor can any distinction here properly be taken as to criminal cases. It is true that here, by some singular scruple, a doubt has more than once been judicially expressed. But it is impossible to see why the Court's power to aid the investigation of truth in this manner should be restricted in criminal cases and the better precedents accept this doctrine." Wigmore on Evid., sec. 1163.

"Moreover, the process of view need not be applicable merely where land is to be observed; it is applicable to any kind of object, real or personal in nature, which must be visited in order to be properly understood. Thus at common law there need be no limitations of the above sorts upon the judicial power to order a view. The regulation of the subject by statute, which began in England some two centuries ago, was concerned rather with the details of the process than with the limits of the power. Statutes now regulate the process in almost every jurisdiction, but it may be assumed that the judicial power to order a view exists independently of any statutory phrases of limitation." Wigmore on Evid., sec. 1163.

In *Springer* v. *Chicago* (1891), 135 Ill. 553, 561, 26 N.E. 514, Craig, J., said:—"If the parties had the right upon the trial to prove by oral testimony the condition of the property at the time of the trial, . . . upon what principle can it be said the Court could not allow the jury in person to view the premises and thus ascertain the condition thereof for themselves? . . . If a plat or photograph of the premises would be proper evidence, why not allow the jury to look at the property itself, instead of a picture of the same? There may be cases where a trial Court should not grant a view of premises where it would be expensive or cause delay, or where a view would serve no useful purpose; but this affords no reason for a ruling that the power to order a view does not exist or should not be exercised in any case. . . . If at common law, independent of any English statute, the Court had the power to order a view by jury (as we think it plain the Court had such power) as we have adopted the common law in this state, our Courts have the same power."

Under sec. 11 of the Criminal Code, 1906 (Can.), the criminal law of England as it existed on the nineteenth day of November, one thousand eight hundred and fifty-eight, in so far as it has not been repealed by any Ordinance or Act, still having the force of law, of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of

the said colonies, or of the colony of British Columbia, passed since such union, or by the Criminal Code or any other Act of the Parliament of Canada, and as altered, varied, modified, or affected by any such Ordinance or Act, shall be the criminal law of the province of British Columbia.

This makes it of importance to consider, as to the province of British Columbia, parts of the statutory law of England which having been enacted subsequently to the year 1792 in which the adoption of the English criminal law took effect in Ontario, were not material to the consideration of *R.* v. *Petrie* (1890), 20 O.R. 317.

The statute 4 Anne, ch. 16, in terms applied "in any action" at Westminster (which phrase would ordinarily not relate to a proceeding by indictment) and authorized the Court to order special writs commanding the selection of six out of the jurors therein named to whom the matters controverted should be shewn by two persons appointed by the Court.

Mansfield, L.J., stated the Rules for Views (1 Burr. 252) as follows: "Before the 4 & 5 Anne, ch. 16, sec. 8, there could be no view till after the cause had been brought on to trial. If the Court saw the question involved in obscurity, which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the Court or Judge at the trial, 'that the nature of the question made a view not only proper, but necessary,' for the Judges at the assizes were not to give way to the delay and expense of a view unless they saw that a case could not be understood without one. However, it often happened in fact that upon the desire of either party causes were put off for want of a view upon specious allegations from the nature of the question that a view was proper, without going into the proof so as to be able to judge whether the evidence might not be understood without it. This circuity occasioned delay and expense; to prevent which the 4 & 5 Anne, ch. 16, sec. 8, empowered the Courts at Westminster to grant a view in the first instance previous to the trial. Nothing can be plainer than the 4 & 5 Anne, ch. 16, sec. 8. The Courts are not bound to grant a view of course; the Act only says 'they may order it where it shall appear to them that it will be proper and necessary.' We are all clearly of opinion that the Act of Parliament meant a view should not be granted unless the Court was satisfied that it was proper and necessary. The abuse to which they are now perverted, makes this caution our indispensable duty; and, therefore, upon every motion for a view, we will hear both parties, and examine, upon all the circumstances which shall be laid before us on both sides, into the propriety and necessity of the motion; unless the party who applies will consent to and move it upon terms which shall prevent an unfair use being made of it, to the prejudice of the other side and the obstruction of justice."

An English statute, of 1825, 6 Geo. IV., ch. 50, secs. 23 and 24, provided that in any case civil or criminal wherever "it shall appear . . . that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in

order to their better understanding the evidence that may be given upon the trial," an order may appoint six or more, to be named by consent or, upon disagreement, by the sheriff, and the place in question shewn them by two persons appointed by the Court; and "those men who shall have had the view, or such of them as shall appear upon the jury to try the issue, shall be first sworn," and only so many added as are needed to make up twelve.

Chitty says: "In cases of indictments for nuisances, it may be necessary, either on behalf of the prosecutor, or of the defendant, for the jury to have a view of the premises indicted. This, it seems, cannot be granted by the Judges at the assizes, but if necessary may be the ground of removal by certiorari into the King's Bench. The power of granting a view, in criminal and civil cases, is now given, by the 6 Geo. 4 ch. 50, sec. 23, to the Court in which the issue is depending, or to a Judge in vacation. The Court will grant it on an indictment for not repairing a highway, or for a nuisance, but not on a prosecution for perjury, unless under particular circumstances. And a view will not be granted, if there is any risk of its misleading the jury. When it is allowed, the same rules will, in general, prevail, as are observable in civil proceedings." 1 Chitty's Criminal Law 483.

A later English statute, 15 & 16 Vict. ch. 76, sec. 114, made an order of a Judge for the view sufficient without the issue of a formal writ of view. A change of venue is authorized by the English Crown rule 45, if a view in another county is necessary: *Clerk* v. *R.*, 9 H.L.C. 184.

It has been held in England the Judge may adjourn the Court to enable the jury to have the view, even after the summing up; but the jury must not communicate with the witnesses during such view: *R.* v. *Martin* (1881), 12 Cox C.C. 204.

In *R.* v. *Whalley*, 2 C. & K. 376, it was held that a view could not be obtained at quarter sessions and an opinion was expressed that it was doubtful whether at assizes there could be a view except by consent. But the necessity for a view seems to be a sufficient ground for removal of the indictment into the King's Bench Division: *R.* v. *Justices of Tradgeley*, Sess. Cas. 180.

The County Court Judge's Criminal Court is a Court of record for all the purpose of the trial and proceedings connected therewith, or relating thereto: Cr. Code (1906), sec. 824. Its general jurisdiction is for the trial of offences which might be tried with a jury at the Courts of general sessions, or quarter sessions, in Ontario; Cr. Code (1906), ch. 825.

The Judge presiding at a County Court Judge's Criminal Court has in any case tried before him, the same power as to acquitting or convicting, or convicting of any other offence than that charged, as a jury would have in case the prisoner were tried by a Court having jurisdiction to try the offence in the ordinary way and may render any verdict which might be rendered by a jury upon a trial at a sitting of any such Court. Cr. Code (1906), sec. 835.

But all of these statutory provisions fall short of making applicable

to such Court even *mutatis mutandis*, the statutory provision regarding a view by the jury contained in Cr. Code sec. 958, quoted supra. Furthermore, if there be any inherent common law jurisdiction pertaining to its quality or status as a Court of record which might authorize a view, it could hardly be held to be more extensive than the powers held by Courts of Assize and Courts of General and Quarter Sessions, and under the established English precedents the view could be taken only "upon consent:" *R.* v. *Redman*, 1 Kenyon, 384; *R.* v. *Whalley*, 2 C. & K. 376; *R.* v. *Justices of Tradgeley*, Sess. Cas. 180.

The trial of criminal cases without a jury is a modern device and no common law practice in regard thereto is available except in so far as the common law as to jury trials may be applicable.

Some of the American decisions as to the practice of granting views by the jury may be here noted:—When there is an inspection of the scene of guilt, it must be shewn what changes, if any, have taken place since the guilty act: *State* v. *Knapp*, 45 N.H. 148. In most jurisdictions the jury may be taken to view the premises: *Com.* v. *Webster*, 5 Cush. 298; *Chute* v. *State*, 19 Minn. 271; *Fleming* v. *State*, 11 Ind. 234; *Doud* v. *Guthrie*, 13 Ill. App. 659, but the visit must be in the presence of the accused: *State* v. *Bertin*, 2 La. Ann. 46. See *State* v. *Ah Lee*, 8 Or. 214. The view may be granted after the Judge has summed up the case: *Reg.* v. *Martin*, L.R. 1 C.C. 378, 41 L.J.M.C. N.S., 113, 26 L.T.N.S. 778, 12 Cox C.C. 204. If a part of the jury are allowed to go by themselves to the view this is error: *Ruloff* v. *People*, 18 N.Y. 179; Wharton's Crim. Evid. 10th ed., sec. 797, p. 1555.

If a view of the property has been given to the jury, the results of it may properly be regarded as part of the evidence in the case. Chamberlayne on Evidence, sec. 2172; *Shoemaker* v. *U.S.* (1893), 147 U.S. 282, 13 S. Ct. 361, 37 L. ed. 170; *Re Guilford* (1903), 85 N.Y. App. Div. 207; *Wead* v. *St. Johnsbury R. Co.* (1894), 66 Vt. 420, 29 Atl. 631; *State* v. *Fillpot*, 98 Pac. Rep. 659, 51 Wash. 223.

Allowing the jury to view the place where the alleged crime was committed, or where some fact or transaction material thereto occurred, being discretionary with the Court, where the premises have been thoroughly described in the evidence, it is not error to refuse defendant to have the jury take the view. This rule applies to capital cases, but in any case if the view is likely to mislead the jury it should be denied. 12 Cyc. 537.

The cases are divided upon the question whether the purpose of the view is to furnish new evidence or to enable the jurors to comprehend more clearly, by the aid of visible objects, the evidence already received. The latter proposition is well sustained and seems more consistent with the conservative theories on which the rules of procedure and jury trials are based, but the contrary theory, holding that the purpose of a view is to supply evidence, is supported by good authorities. 12 Cyc. 537.

The enlargement of the rights of Judges and magistrates sitting without a jury as regards the taking a view of the *locus* seems to be one which calls for legislative action.

Bench and Bar.

LORD MACNAGHTEN'S SUCCESSOR.

Sir Robert John Parker, one of the justices of the Chancery Division of the English High Court, succeeds the late Lord Macnaghten as Lord of Appeal in Ordinary, taking the title of Lord Parker of Warrington. Lord Parker's elevation is unprecedented, no other puisne judge having become a Lord of Appeal without first serving as a Lord Justice. As a Chancery judge he had occasion to deal with many patent cases and he is skilled in that branch of the law, and the *Law Journal* speaks highly of "his fine judicial spirit, his strong inclination to disregard mere technicality, and his urbane air of scholarship." Mr. Justice Sargant receives the vacant place in the Chancery Division.—Ex.

REASON FOR JUDICIAL PATIENCE.

An exchange, speaking of a learned and well known Chief Justice of Ontario, says that he is sometimes a rather arbitrary and curt ruler of the court. "On a recent occasion a prominent member of the Bar was presenting his argument to the learned judge and was proceeding to elaborate on a certain point of law which he thought had an important bearing on the issue. But the judge thought otherwise. He was impatient. For a while he listened to the lawyer's argument, then he leaned back with an air of boredom, and interrupted with: 'Mr. ———, it seems to me that this is not relevant. What reason is there why I should be compelled to listen to all this?' The counsel's mouth had just a suspicion of a smile round its corners as he answered: 'Reason, my lord—why, $8,000 per year.' "

LORD GORELL.

John Gorell Barnes (who died recently at Mentone of an attack of influenza) was born in May, 1848, and was the son of Mr. Henry Barnes, a ship-owner, of Liverpool. He went to Peterhouse, Cambridge, and took his degree in mathematical honours in 1868, when he was barely twenty. Entering the Inner Temple, he became a pupil of the late Lord Justice Matthew, and was

called to the Bar in Hilary Term, 1876, taking silk in 1888. Upon Sir Francis Jeune's promotion to the Presidency of the Probate Division, caused by the death of Sir Charles Butt, Mr. Barnes was in 1892 raised to the Bench, and upon the death of Sir Francis Jeune, in 1905, he became president of the Probate Division, from time to time sitting in the Court of Appeal. In 1909 he was raised to the peerage as Baron Gorell of Brampton. He presided over the committee which considered the Naval Prize Bill and over the committee on County Court Procedure and the Divorce Royal Commission, and in 1909 he was an active member of the Committee on Stage Plays. He is succeeded by the Hon. Henry Gorell Barnes.—*Law Times.*

Flotsam and Jetsam

NEGLIGENCE—INNKEEPER—DUTY TO INTOXICATED GUEST.—An intoxicated guest fell from a hotel porch and subsequently died of exposure. The innkeeper, who, after discovering his situation, but not his injury, allowed him to remain there, was held not liable, the act being mere nonfeasance. *Scholl* v. *Belcher*, 127 Pac. Rep. 968 (Ore., 1912).

It is the duty of an innkeeper to take reasonable care of his guests. *Scott* v. *Churchill*, 15 Misc. 80 (N. Y., 1895); *Sandys* v. *Florence*, 47 L.J.C.P. 598 (1878); *West* v. *Thomas*, 97 Ala. 622 (1892); *Omaha Hotel Ass.* v. *Walters*, 23 Neb. 280 (1888). He is not, however, an insurer. *Weeks* v. *McNulty*, 101 Tenn. 495 (1898); *Clancy* v. *Barker*, 131 Fed. 161 (1904); *Sheffer* v. *Willoughby*, 163 Ill. 518 (1896). So if a defect in the premises is obvious the guest must use reasonable care. *Smeed* v. *Morehead*, 70 Miss. 690 (1893); *Bremer* v. *Pleiss*, 121 Wis. 61 (1904); *Ten Broek* v. *Wells*, 47 Fed. 690 (1891).

Drunkenness does not relieve a man from the same degree of care required of a sober man. *Fisher* v. *R. R.*, 39 W. Va. 366 (1894); *Welty* v. *R. R.*, 105 Ind. 55 (1885); *Rollestone* v. *Cassirer*, 3 Ga. App. 161 (1907); *Keeshan* v. *Elgin Tract Co.*, 229 Ill. 533 (1907). A carrier is not bound to care for a drunken passenger. *Statham* v. *R. R.*, 42 Miss. 607 (1869); *R. R.* v. *Woodward*, 41 Md. 268 (1874). But is bound to do nothing which, in view of his helpless condition will expose him to unnecessary danger. *Weber* v. *R. R.*, 33 Kan. 543 (1885); *Wheeler* v. *R. R.*, 70 N.H. 607 (1900); *Black* v. *R. R.*, 193 Mass. 448 (1906); *R. R.* v. *Marrs*, 119 Ky. 954 (1905).

SPECIFIC PERFORMANCE—SALE OF LAND—EFFECT OF FIRE—On a bill for specific performance of a contract for sale of real estate, where fire destroyed the buildings before the execution of the deed or payment of balance of purchase money, it was held that the vendor could not obtain specific performance and the loss must fall upon the vendor. *Good* v. *Jarrard,* 76 S.E. Rep. 698 (S.C., 1912).

The doctrine of the principal case, that the vendor must bear the loss by fire or other accident happening between the making of the contract and its completion, is contra to the weight of authority and is followed directly in but five other state courts: *Cutliff* v. *McAnally,* 88 Ala. 507 (1889); *Gould* v. *Murch,* 70 Me. 288 (1879); *Thompson* v. *Gould,* 20 Pick. 134 (Mass., 1838); *Wilson* v. *Clark,* 60 N.H. 352 (1880); *Powell* v. *Dayton Co.,* 12 Ore. 488 (1885). The question is expressly left open in *Wetzler* v. *Duffy,* 78 Wis. 170 (1890). The New York courts seem to favour the rule in the principal case in their later decisions, *Smith* v. *McCluskey,* 45 Barb. 610 (1866); *Goldman* v. *Rosenberg,* 116 N.Y. 78 (1899); *Listman* v. *Hickey,* 65 Hun. 8 (1892); but in *Listman* v. *Hickey,* supra, which on its facts is more nearly like the principal case, Paterson, J., based his opinion upon the fact that the contract in question was for both real and personal property and was entire; he distinctly recognised the general rule to be that of *Paine* v *Meller,* infra, but distinguished this case from it on grounds given above.

The rule followed in the majority of jurisdictions (contra to the principal case) that the loss falls upon the vendee, was first laid down in *Paine* v. *Meller,* 6 Vesey, 349 (Eng., 1801), and has been followed repeatedly in this country: *Willis* v. *Wozencraft,* 22 Cal. 607 (1863); *Sherman* v. *Loehr,* 57 Ill. 509 (1871); *Cottingham* v. *Fireman's Co.,* 90 Ky. 439 (1890); *Skinner* v. *Houghton,* 92 Md. 68 (1900); *Walker* v. *Owen,* 79 Mo. 563 (1883); *Franklin Co.* v. *Martin,* 40 N.J.L. 568 (1878); *Gilbert* v. *Port,* 28 Ohio 276 (1876); *Dunn* v. *Yakish,* 10 Okl. 388 (1900); *Elliott* v. *Ashland Co.,* 117 Pa. 548 (1888); *Brakhage* v. *Tracy,* 13 S.D. 343 (1900).

If the vendor agrees expressly to deliver possession of premises in the same condition in which they were at the time of the bargain, he must, obviously, bear the loss resulting from fire or other accident. *Marks* v. *Tichenor,* 85 Ky. 536 (1887). It is equally clear that a person, whether he be the vendor or vendee, must be answerable for any loss due to his own negligence. *Mackey* v. *Bowles,* 98 Ga. 730 (1896).

A PROVINCIAL SCOT:—How little the change that has come over the legal profession in Scotland may be divined from the following characterization of Lord Cockburn, from an article by W. G. Scott-Moncrief in the *Judicial Review*:—"Cockburn was a Scotsman of a type which no longer exists. In his rank of life, through constant intercourse with the greater world of England, not to speak of the Continent, men have necessarily become much more cosmopolitan than they were in days when the only link between the Edinburgh Courts and parliamentary life in London was the Lord Advocate for the time being, who travelled between the two cities in coaches, public or private, and made the weary journey, we may well suppose, as seldom as possible. Cockburn could hardly have conceived the day when quite a body of advocates would spend their nights in sleeping carriages, and divide their business hours between Edinburgh and Westminster; nor could he have imagined that the time would come when a greater judicial prize than the Lord Presidentship would attract the ambition of Scottish legal talent. He does not seem to have had that educational connection with the Continent which our older generation of lawyers enjoyed. There is no evidence that he ever crossed the Channel.

THE HABIT OF WORDY ARGUMENT:—More than one judge of late has attributed the increasing length of trials to the growing habit of repetition at the Bar. It is not a new complaint. "He was careful to keep down repetition to which the counsel, one after another are very propense; and, in speaking to the jury on the same matter over and over again the waste of time would be so great that, if the judge gave way to it, there would scarce be an end, for most of the talk was not so much for the causes as for their own sakes, to get credit in the county for notable talkers"——thus it is written in the biography of Lord Chief Justice North. A certain amount of repetition (says the *Globe*) is, of course, necessary for emphasis, to say nothing of comprehension. Lord Parker, in a humorous speech he made at a law students' dinner a day or two before his elevation to the House of Lords, remarked that when he was at the Bar he made it a practice to repeat each argument at least twice. And the new Lord of Appeal's practice never required him to address a jury! —*The Law Journal.*