CASE AND COMMENT.

CONSTITUTIONAL LAW—PROVINCIAL LEGISLATION—EXCISE DUTY — DIRECT TAXATION — TRADE AND COMMERCE. — The decision in *Attorney-General for British Columbia v. Kingcome Navigation Company, Limited*[1] is of more than usual importance. The validity of the *Fuel Oil Tax Act* of British Columbia[2] was in question. This imposed a tax of one-half cent a gallon on every consumer of fuel oil in the province. It was contended by the defendant company, when sued for non-payment of the tax, that the Act was *ultra vires* because (a) in its nature it was an import duty or an excise duty, (b) it was indirect taxation, since it might be passed on, and (c) it was an interference with the Dominion power to regulate trade and commerce. The Supreme Court of British Columbia[3] and the Court of Appeal[4] (MacPhillips, J. dissenting) sustained these contentions. Four out of these five Canadian judges considered that the statute imposed an excise duty, and hence invaded an exclusive Dominion sphere; two maintained further that it was an interference with trade and commerce, since it appeared that the Dominion Government allowed fuel oil to enter the province free of customs duties, and that this tax was imposed to assist the coal interests of the province who suffered from the competition of fuel oil.

Lord Thankerton gave the judgment for the Judicial Committee. He had no difficulty in finding that the tax was imposed upon the very person intended to pay it, without there being any likelihood or intention that it should be passed on. It, therefore, fell squarely within Mills' accepted definition of direct taxation, which, it was stated, was the proper test to be applied. As regards the question of excise, the tax, once found to be direct, was said to be "none the less direct, even if it might be described as an excise tax, for instance, or is collected as an excise tax".[5] The distinguishing feature of the excise tax was found to lie in the fact that it is one imposed on commercial dealings in commodities, a trading tax, and "more concerned with the commodity in respect of which the taxation is imposed than with the

[1] [1934] A. C. 45.
[2] 1930 c. 71; 1932, c. 51.
[3] [1933] 1 D.L.R. 688.
[4] [1933] 3 D.L.R. 364.
[5] [1934] A.C. 45 at p. 55.

particular person from whom the tax is exacted."[6] The tax in question was imposed on the consumer of fuel oil, being a peculiar contribution upon him and did not relate to any commercial transaction in the commodity between the taxpayer and some one else. Their Lordships were unable to find on examination of the Act, "any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel oil nor in respect of any contract or arrangement under which the oil is consumed", though individual taxpayers might recoup themselves by such an arrangement. Hence the tax was direct and valid, and was not excise.

The plea that the tax interfered with trade and commerce was briefly disposed of. It was stated that[7], "If the taxation falls within the terms of s. 92, head 2, that is, if it is direct taxation within the Province in order to raise a revenue for Provincial purposes, and it does not purport to regulate trade and commerce, there is no reason to limit the legislative power expressly conferred on the Province"; and the dictum in the *Lambe* case[8] was cited to the effect that, "If they find that on the due construction of the Act a legislative power falls within s. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament."

This decision considerably enlarges our legal, if not our historical, understanding of what the British North America Act intended in the way of division of taxing powers. Certain very important conclusions suggest themselves. First, it is clear that the lead given in the *Fairbanks'* case[9] can no longer be safely followed. There Lord Cave declared that at the time of Confederation certain taxes were universally recognised as being either direct or indirect, and it could not have been the intention of the framers of the Act to disturb the accepted categories. Mill's formula might be a useful guide in classifying a new or unfamiliar tax, but it "cannot have the effect of disturbing the established classification of the old and well-known species of taxation, and making it necessary to apply a new test to every particular member of those species".[10]

Accordingly, a business tax on real estate was held to be direct, because in 1867 it would have been universally so

[6] [1934] A.C. 45 at p. 59.
[7] [1934] A. C. 45 at p. 60.
[8] *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575 at p. 587.
[9] *City of Halifax v. Fairbanks' Estate*, [1928] A.C. 117.
[10] [1928] A.C. 117 at p. 125.

regarded, though in fact it might well be passed on by the owner to the tenant. In view of this explicit ruling, it is not surprising that the approach of the British Columbia courts to the problem raised on the present case was one of inquiry as to whether such a tax on consumption as the Fuel Oil tax would have been considered to be within the "established classification" of excise taxes, and hence indirect, in 1867; nor that, having found this to be so, they refused to do the forbidden thing of transferring a tax universally recognised as belonging to one class to a different class of taxation.

As MacDonald, J. A., said in the Court of Appeal[11], "The case of *Halifax* v. *Fairbanks'* is conclusive".

This reasonable interpretation, however, did not prevail in the Privy Council. Lord Thankerton stated that the decision in the *Fairbanks'* case was "in accordance with the principles already stated by their Lordships as those to be derived from the earlier decisions of the Board,"[12] i.e. there was a straight application of Mills' definition, his reason being that the property tax there in question was imposed, not in respect of a transaction or some dealing in commodities, but in respect of the particular taxpayer's interest in property, being a peculiar contribution upon him with the intention and desire that he should pay it, even though it might be possible for him to pass it on. This restating of the *ratio decidendi* in the *Fairbanks'* case amounts to a virtual over-ruling, and is reminiscent of the treatment accorded to *Russell's* case by Lord Haldane in *Toronto Electric Commissioners v. Snider.*[13] Henceforth it appears that the question of what the tax was universally considered to be in 1867 is irrelevant.

Another important part of this holding is the interpretation given to section 122 of the *British North America Act.*[14] A reading of this section in its context in the Act suggests that at Confederation all taxes falling under the head of customs and excise were intended to be within the exclusive jurisdiction of

[11] [1933] 3 D.L.R. at p. 382.

[12] [1934] A.C. at p. 57. This is rather astonishing: the *Fairbanks'* case very definitely suggested a new line of approach, not at all in conformity with earlier decisions. It is possible that the tax in the *Fairbanks'* case might have been upheld on Mills's formula, but the fact remains it was not, except in the courts below, and they were over-ruled. (See [1926] S.C.R. 349). Yet now we are told that really Mill's formula was applied by Lord Cave!

[13] [1925] A.C. 396 at p. 412.

[14] S. 122. "The Customs and Excise laws of each province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada".

the Dominion Parliament. Such taxes were said to continue in force, "until altered by the Parliament of Canada". The provinces, once the *British North America Act* came into effect, therefore lost all jurisdiction over them. It is noteworthy that a special section was provided to meet this particular case, whereas the continuation of all other laws in force at Confederation was provided for only in the general terms of section 129. The Dominion authority over customs and excise was thus not left to chance or to implication, nor to the interpretation of sections 91 and 92 alone, section 122 being additional to the Dominion power to levy any form of taxation under section 91, head 3. In addition to the express holding of the courts below in the present case, there are judicial *dicta* giving section 122 the effect just suggested, the most recent and authoritative being that of Lord Macmillan in *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Company*,[15] where he said:[16] "The appellant admitted that the imposition of customs and excise duties is a matter within the exclusive competence of the Dominion Parliament, as, indeed, plainly appears from s. 122 of the British North America Act. The reason for this is, no doubt, that the effect of such duties is not confined to the place where, and the persons upon whom, they are levied, which is perhaps just another way of saying that they are indirect taxes."

On this view of section 122 no tax properly falling within the category of customs and excise would be lawful to a province, no matter whether it was direct or indirect, the well-known rules of interpretation being presumably applicable, that the Act must be read as a whole, and that merely general language in one part of the Act is to be harmonized with expressions that are at once precise and particular by treating the latter as operating by way of exception. Following this argument, the British Columbia Courts found that the Fuel Oil tax here in question being a tax on consumption fell clearly within accepted definitions of excise. Lord Thankerton, while impliedly admitting that the Dominion has jurisdiction over excise, treated section 122 as though it were of no lasting consequence, being merely a provision[17] "for the temporary continuation of the then existing legislation as regards customs and excise". He went on, as has been shown,

[15] [1930] A.C. 357 at p. 364.

[16] See too Middleton, J. in *Treasurer of Ontario* v. *Canada Life Assurance Co.* (1915), 22 D.L.R. 428 at p. 434, where the more reasonable view is expressed that the power of imposing customs and excise duties was assigned to the Dominion so that its general fiscal policy should not be interfered with by a province.

[17] [1934] A.C. 45 at p. 59.

to give his own definition of what excise taxes were and proved that, as they were not concerned with individuals but with commercial dealings in commodities, they fell within Mill's definition of indirect taxes. In other words, customs and excise are merely examples of the indirect taxes prohibited to the provinces; they are not a special class of tax ascertainable by some test other than Mill's definition. Hence section 122 disappears from the *British North America Act*. We now know that if a provincial tax is so worded as to impose itself upon a person who cannot pass it on, in respect of his ownership or use of property, rather than upon a transaction or commercial dealing in the property, it is direct taxation and not excise, regardless of the fact that such a tax might have been universally regarded as excise in 1867. The choice of words used in the statute will, therefore, make all the difference.

This interpretation puts the intentions of the Fathers of Confederation in a curious light. They gave excise and customs to the Dominion Parliament, but left the provinces free to collect what are essentially the same taxes so long as the taxing statute was carefully enough worded so as to tax the person and not the transaction. The Dominion alone can tax the sale of cigarettes, for instance, since that is excise, but the province can tax a person who consumes cigarettes. One is direct taxation, the other indirect. This result indicates the highly artificial character of Lord Thankerton's distinction, [18] since there is no such thing as taxing a "transaction" or "dealing"; every tax must be imposed on some person who is obliged to pay. The difference between taxing a person in respect of a commercial dealing and taxing him in respect of consumption is, to say the least, slight. It was not unreasonable to inquire whether a tax on consumption would have been considered excise in 1867, nor, it is submitted, was the conclusion unreasonable that it would have been so regarded. With Lord Thankerton's narrow meaning of excise, there was little need to give licensing powers to the provinces under section 92, head 9. The approach of Lord Cave in the *Fairbanks'* case to the whole problem seems more in accordance with the express wording of the *British North America Act* since it would have given a real effect to section 122. As it is, we must now allow the provinces the right to impose customs duties if the taxing statute can be drawn with

[18] As MacDonald, J. A. says, "Properties do not pay taxes of any kind; individuals pay the levy. It is an over-refinement, therefore, to say that where a tax is imposed on the consumer, rather than on the thing consumed, different results follow". See [1933] 3 D.L.R. at p. 381.

sufficient ingenuity to prevent the tax being passed on. The Dominion has no greater jurisdiction over customs than it has over excise.

Lastly, the manner in which the Privy Council in this case disposed of the contention that the *Fuel Oil Tax Act* interfered with the regulation of trade and commerce is particularly open to criticism. It was stated that if the taxation is direct, in order to raise a revenue for provincial purposes, and does not purport to regulate trade and commerce, there is no reason to limit the legislative power expressly conferred on the province. This is quite true, but it begs the question. The question is to find out whether this statute is of that character or not. Is it what it purports to be? It is no answer to this question to say that once the power has been found to fall within section 92 it would be wrong to deny its existence because it might be abused, since we must first find out whether it does fall within section 92, and here the problem of colourable legislation must be considered. The Courts below found that under guise of direct taxation the province was attempting to control trade and commerce. The exemption of fuel oil from customs duties, its competition in the British Columbia market with locally produced coal, were relevant facts admitted as evidence and judicially noted. At this stage of the enquiry there is no help to be found in *Bank of Toronto* v. *Lambe*. That holding only applies *after* the power has been properly identified. In order to find out whether a tax falls within the provincial field more must be ascertained than its directness according to Mills' test. It must also be found to be "in order to the raising of a revenue for provincial purposes". The imposition of direct taxes for other purposes is evidently unauthorized. The usual rules regarding the "pith and substance," the "true nature and character" of the statute must be applied, for colourable legislation is just as void for a province as for the Dominion. Would the Privy Council, for instance, uphold a provincial tax which singled out the British products admitted free under the Ottawa agreements and rendered their consumption impossible by reason of the excessive rate of the tax on the provincial consumer? The point surely needs no arguing: such a tax, though direct according to Mill and not purporting to regulate trade, would not properly be considered the sort of taxation permitted to a province by section 92, head 2. The "purport" of the statute, with all deference to Lord Thankerton's implication to the contrary, has nothing whatever to do with the case. The rule is well settled that in seeking the legislative aspect and purpose of the statute the courts will, if necessary,

disregard title or preamble or misused words[20]. Admittedly, the task of discovering the true nature of an act of parliament is a delicate one, from which the members of the Judicial Committee, in their ignorance of Canadian conditions, may well shrink. But it must be undertaken, and the weakness of the holding under discussion is that it evades this duty and appears to justify the evasion by invoking a rule that is never applicable until the duty has been performed. If this decision is to be taken as authority for the proposition that once a provincial tax is found to be direct there is no need to enquire whether or not it interferes with trade and commerce, not only will the *British North America Act* itself be obviously contradicted but the established rules for its interpretation will need radical revision.

F. R. SCOTT

McGill University.

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CRIMINAL LAW—ILLITERATE JURORS—VALIDITY OF VERDICT

It may be suggested that the effect of the recent case of *Ras Behari Lal and Others* v. *The King Emperor*,[1] is to add an element of confusion to the criminal law. Previous to the *Ras Behari Lal* case the law seemed to be that decisions of juries were to be regarded as sacrosanct and it was, therefore, not within the ambit of any court's power to enquire into the verdict. As Wigmore lucidly states:[2] "*After the verdict* has been pronounced by the jury and accepted by the Judge, and the jury has been discharged, the verdict is final, as regards its meaning and effect."

Obviously, if every verdict of a jury were to be open to the interpretation and the examination of the law courts the question might very well arise as to whether or not the function of a jury would be entirely negatived. Added to this is the fact that public policy demands that deliberations in the jury room should not be broadcast to the world. Jurors would be loathe to assume their responsibilities if such were the case. On the other hand there have been numerous cases where, subsequent to a jury's verdict, cogent evidence has appeared to show that a manifest injustice would result were the verdict allowed to be carried into effect. It is this particular type of situation which should allow of an exception to the general rule that a jury's verdict should not be open to review by the courts.

[20] Clement, p. 490, and authorities there cited; also *Reciprocal Insurers'* case, [1924] A.C. 328.

[1] (1933), 50 T.L.R. 1.

[2] Wigmore on Evidence, vol. 5, p. 145.

The recent case of *R.* v. *Thomas*[3] approves the earlier English cases,[4] which have till now proven to be the main bulwark against any attempt to obtain a new trial after it was discovered that an injustice had resulted. In *R.* v. *Thomas* the Court of Criminal Appeals refused to receive evidence of the incompetency of a juror to serve, after the verdict had been rendered, the affidavit of the juror himself to the effect that he did not understand the English language being held to be inadmissible.

This doctrine of *R.* v. *Thomas* has now been definitely exploded by the decision in the *Ras Behari Lal* case.[5] Our main problem is to ascertain just how far this latter case goes. While at first reading the *Ras Behari Lal* case may seem to go quite far, it is submitted that it does not revolutionize the previous law but rather modifies the law in a sane and rational way which is in keeping with liberal movements seeking a more equitable and just trial for prisoners in British courts of justice.

In the case of *Ras Behari Lal*, a number of native subjects of India, were on trial for murder. The jury was empaneled, there being no objection to the jurors at the trial. The exhibits, addresses of both counsel and the judge's charge to the jury were all delivered in English. The jury brought in a verdict of guilty. It subsequently transpired that several of the jurors could not understand the English language. On an appeal from the Court of Appeal of India the Privy Council held that the sentences must be set aside on the ground that a gross miscarriage of justice would otherwise result. In the rationale of this case the Privy Council in a clear voice disposes of *R.* v. *Thomas* as follows:[6] "But as far as *R.* v. *Thomas* decides that no evidence is admissible after verdict to establish the inability of a juror to understand the proceedings, their Lordships definitely disagree with it." And again:[7] "It would seem remarkable that if evidence of neighbours could be given that a juror did not understand English, it should not be open to the prosecution to produce the strongest evidence possible by calling the juror himself to show that he fully understood the proceedings. Similarly their Lordships are unable to accept the view that any presumption of assent by all the jurors to a verdict given in their presence is decisive or indeed relevant to the question."

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[3] (1933), 49 T.L.R. 546.

[4] *Robert* v. *Hughes* (1841), 7 M. & W. 399; *Raphael* v. *Bank of England* (1855), 17 C.B. 161; *Ellis* v. *Deheer*, [1922] 2 K.B. 113.

[5] *Supra.*

[6] Per Lord Atkin, 50 T.L.R. 1 at p. 2.

[7] (1933), 50 T.L.R. 1 at p. 2.

The question of the illiteracy of a juror is one which affects the status or capacity of the juror to serve as such, and, therefore, the Privy Council with painstaking care points out that it is only considering the capacity of the juror to serve, and is not reviewing the deliberations of the juror's mind in arriving at his verdict. The Privy Council still follows the old rules of law that a jury's verdict is not open to examination. It does not attempt to pry into the reasoning of the juror in arriving at his decision but rather seeks to enquire into his ability to act as a juror in order to enter into his duties. This distinction is the underlying theme of the *Ras Behari Lal* case. In the words of Lord Atkin:[8] "The question whether a juror is competent for physical or other reasons to understand the proceedings is not a question which invades the privacy of the discussions of the jury-box or in the retiring room. It does not seek to inquire into the reasons for a verdict." Also: "The problem is whether the assent so given or inferred is of a competent juror, *i.e.*, in such a case as the present, not so incapacitated from understanding the proceedings as to be unable to give a true verdict according to the evidence. The objection is not that he did not assent to the verdict, but that he so assented without being qualified to assent."

In order to arrive at the *ratio decidendi* in this case the Privy Council endorses a dictum to be found in the case of *Mansell* v. *The Queen*[9] in which Lord Campbell said:[10]

> We are not now to define the limits of this authority; but we cannot doubt that there may be cases as if a juryman were completely deaf, or blind, or afflicted with bodily disease which rendered it impossible to continue in the jury-box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relation that he could not duly attend to the evidence, in which, although from there being no counsel employed on either side, or for some other reason, there is no objection made to the juryman being sworn, it would be the duty of the judge to prevent the scandal and perversion of justice which would arise from compelling or permitting such a juryman to be sworn, and to join in a verdict on the life or death of a fellow creature.

It can be readily appreciated that there are many objections to the adoption of the above passage *in toto*. If the status of a juror to serve as such is to be determined by such criteria as bodily disease, insanity, drunkenness, or "with his mind preoccupied by the death of a near relation" the only safeguard for the Crown to be certain that once a verdict was rendered it would remain final would be to subject each juror to an intelligence test, a medical test, and a lengthy discourse as to the health of his immediate family. Otherwise one could never be certain that at

[9] *Mansell* v. *The Queen* (1857), 8 E. & B. 54.
[10] (1857), 8 E. & B. 54 at p. 80.
[8] *Ibid.*

a later date counsel for a prisoner might move for a new trial on the ground that a juror was suffering from an abscessed tooth or that his wife was ill.[11] The absurdity of such a state of law can be readily seen. Were the dictium accepted unreservedly the very ends of justice could be defeated and the cure would be far worse than the illness itself. On the other hand there is a sane and rational argument in favour of new trials in cases of illiteracy and possibly in other circumstances. Consider the case of a moron who through some inadvertance serves as a juror!

It is submitted that the following reservations should be placed upon the dictum of *Mansell* v. *The Queen*. First, no right of a new trial should be granted in cases where counsel or the prisoner knew of the juror's defect at the time of trial. Second, the right of a new trial should only be granted by the court even if the juror had not the capacity to serve, in cases where the court feels a miscarriage of justice would result. Canadian cases have adopted this view.[12] Third, the court should limit the doctrine to cases where the juror is physically incapacitated from serving on the jury. Once the court finds that the juror at the time of trial possessed all the physical attributes which he needed in order to hear the evidence and form his own conclusion, then it should not be concerned with the question as to whether, in fact, the juror exercised his facilities or suffered mental anguish at the trial. This restriction to the dictum of *Mansell* v. *The Queen* is needed in order to avert a wholesale exploitation of the court's power to review the capacity of jurors.

The problem has arisen in Canada in a number of cases [13]but in addition to the difficulties the courts of England have had to traverse, there is added a provision of the *Criminal Code*,[14] which provides that:

> No omission to observe the directions contained in any Act as respects the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, the drafting of panels from the jury lists or the striking of special juries, shall be a ground for

[11]An example of the extent to which this doctrine has been pushed in the United States is to be found in *U.S.* v. *Pleva*, 66 Fed. (2nd) 529; C.C.A. 2d (1933). In this case the juror was sick physically and assented to the verdict. A new trial was granted on the grounds that the juror suffered mental anguish. See Comment: (1934), 47 Harv. L. Rev. 717; also *Clark* v. *U.S.* (1932), 61 Fed. (2nd) 695.

[12] Note the recent case of *Rex* v. *Minness and Moran*, [1934] 1 W.W.R. 25, especially the able judgment and review of cases by Martin, J. A.

[13] *Bussieres* v. *King* (1931), 53 Que. K.B. 16; *King* v. *Stewart*, [1932] 4 D.L.R. 337; Montreal *St. R. Co.* v. *Normandin* (1917), 33 D.L.R. 195; *R.* v. *Battista* (1912), 9 D.L.R. 138, 21 C.C.C. 1; *R.* v. *Boak*, [1925] 3 D.L.R. 887; *Brisebois* v. *Queen* (1888), 15 Can. S.C.R. 421; *R.* v. *McCrae* (1906), 16 Que. K.B. 193.

[14] S. 1011.

impeaching any verdict, or shall be allowed for error upon any appeal to be brought upon any judgment rendered in any criminal case.

In *The King* v. *Stewart*,[15] where a juror was disqualified by a provincial statute of British Columbia, yet had actually served as a juror and had rendered his decision, the Supreme Court of Canada refused to grant a new trial, applying this section of the *Criminal Code*. Duff, J. said:[16] "In the absence of some such provision as sec. 1011, the presence of this disqualified juror would have been sufficient for quashing the conviction. But in my opinion, that particular illegality is one of the class contemplated by that section, therefore the objection is not open to the respondent."

It could, however, be argued that cases of illiteracy or physical incapacity are certainly not those types of disqualifications contemplated by the above section of the Code and further, that section 1014 (c) of the *Criminal Code*, provides that, "On the hearing of any such appeal against conviction the court of appeal shall allow the appeal if it is of the opinion that on any ground there was a miscarriage of justice." This view has already been adopted by a number of Canadian cases.[17] In effect then, our *Criminal Code* automatically dismisses technical objections regarding disqualification of jurors and leaves the problem of physical incapacity basically as outlined above.

R. A. KANIGSBERG.

Halifax.

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[15] *Supra.*

[16] [1932] 4 D.L.R. 337 at p. 341.

[17] *Rex* v. *Minness and Moran, supra; Bussieres* v. *King, supra.*