CASE COMMENTS AND NOTES

CRIMINAL PROCEDURE—SECTION 417 OF CRIMINAL CODE—WHETHER DISCRETIONARY POWER TO REFUSE WAIVER OF JURY—*R.* v. *LYDING* (1965), 54 W.W.R. 286.

Alberta is the only province in Canada where all indictable offences may be tried by judge alone without the intervention of a jury. The enabling provision for this unique criminal procedure is Section 417 of the *Criminal Code*. This section is a relic of the Northwest Territories Act.[1] Section 417 states:

> Notwithstanding anything in this Act, an accused who is charged with an indictable offence in the Province of Alberta may, with his consent, be tried by a judge of the superior court of criminal jurisdiction of Alberta without a jury.

This provision means that only in Alberta can an accused charged with the crimes listed in s. 413 (2)—rape, sedition, murder, manslaughter, death by criminal negligence, conspiracy, etc., be tried without a jury. In the rest of Canada s. 415 makes trial by jury compulsory for all of these offences.

The question of legal interest concerning s. 417 is whether a judge has a discretionary power to refuse an election made thereunder or whether the right to waive trial by jury is wholly at the whim of the accused. As a matter of normal procedure the Court never refuses an election under this section, though it was not doubted that the Court had such a discretionary power.[2] However, in the recent case of *R.* v. *Lyding*[3] the judgment of Milvain, J., has cast some doubt upon the assumption that s. 417 gives the Court a discretionary power.

When Lyding was indicted for capital murder he elected under s. 417 to be tried by judge alone, but Manning, J., refused to allow the election. Manning, J., held that he had complete discretion under s. 417 to refuse to try Lyding without a jury. In support of this discretionary power he quoted from the judgment of Ford, J.A., in *R.* v. *Bercov*:

> It is clear from the decision of the Supreme Court of the Northwest Territories in *Reg.* v. *Brewster* (1896), 2 Terr. L.R. 353, a decision with which I entirely agree, that the election for or consent to a trial without the intervention of a jury is not for all purposes conclusive. In that case it was held that notwithstanding the consent of the accused the Judge may refuse to try the case alone.[4]

Manning, J., further reasoned that the use of "may" in s. 417 indicates that the intention of the legislature was to create a permissive rather than a mandatory power.[5] Therefore, notwithstanding the election to be tried by judge alone the accused was tried and convicted with a jury.

On appeal, the Supreme Court of Alberta, Appellate Division, directed a new trial for reasons unconnected with the original application under s. 417. Again the accused elected trial by judge alone. This time Milvain, J., was presiding and he allowed the application.

1 The Northwest Territories Act, R.S.C. 1886, c. 50, s. 67.
2 *Reg.* v. *Skelton* (1898), 4 C.C.C. 467.
3 (1965), 54 W.W.R. 286.
4 (1949), 96 C.C.C. 168, 172 (Alta. C.A.).
5 *R.* v. *Brewster* (1896), 2 Terr. L.R. 353.

In his reasons for *not* refusing Lyding's election, as his brother Manning, J., had done, Milvain, J., restricts the discretionary power of a judge under s. 417. Although he admitted that there was a discretionary power, he went further to hold, inconsistently with this admission, that the use of "may" in this unique section is to be construed as "must" and therefore a judge is compelled to allow an election where the accused has so consented. He relied on Coleridge's, J., reasoning in *R.* v. *Tithe Commnrs.*[6] to the effect that if the statute is for the "public benefit" the enactment is imperative notwithstanding the use of "may":

> The words undoubtedly are only empowering; but it has been so often decided as to have become an axiom, that, in public statutes, words only directory, permissory or enabling may have a compulsory force when the thing to be done is for the public justice.

Milvain, J., stated that this view was adopted with approval by Lord Cairns in *Julius* v. *Oxford* (Bp).[7] It may be true that the Lord Chancellor did not object to the sentence quoted from Coleridge, J., but there is both high authority and cogent reasoning to the effect that this test is not entirely acceptable. In *Halsbury's Laws of England* it is stated concerning this sentence:

> . . . the authorities do not appear to bear out either this proposition or the still wider one that all powers conferred for the public good are to be construed as obligatory.[8]

The correct proposition seems rather to be that stated by Lord Blackburn in the *Julius* case. He said, in commenting on the passage quoted from Coleridge, J.:

> The only part of this to which exception may be taken is the use of the word 'public;' if by that it is to be understood either that enabling words are always compulsory where the public are concerned, or are never compulsory except where the public are concerned, I do not think either was meant. The enabling words are compulsory *whenever the object of the power is to effectuate a legal right.*[9]

The true test then is not whether "the thing to be done is for the public justice" as suggested by Milvain, J., but rather it is a question of determining if the "thing to be done" is a legal right. This was the position adopted by the Supreme Court of Canada in *Labour Relations Board* v. *Regina.*[10] Clearly a power "for the public benefit" is not synonymous with one that "effectuates a legal right." To say that an accused has a legal right to trial by judge alone is a bold step indeed, and one that must be made without the confidence of authority. The legal right to trial by jury does not on the basis of any statutory interpretation give rise to a correlative legal right to waiver.[11]

There is likewise little authority in the common law development of the jury for the proposition that an accused has the legal right to waive the jury in criminal cases. This is not surprising. The purpose of the whole historical movement was to guarantee the right to a jury trial to persons accused of crime. The modern jury evolved from inquests employed by Norman and Angevin kings to obtain information.[12] The

6 (1849), 14 Q.B. 459. This kind of interpretation at least illustrates how words whose double *entendre* is not restricted to spicy stories may play tricks on us.
7 (1880), 5 App. Cas. 214, 225.
8 36 *Halsbury's Laws* 434 (3d ed. Simonds 1955).
9 *Op. cit. supra*, n. 7, at 244. Italics added.
10 [1956] S.C.R. 82, 87; see also *Fleming & Ferguson* v. *Burgh of Paisley*, [1948] S.L.T. 457.
11 *Patton* v. *U.S.* (1930), 281 U.S. 276, 312; see note 1930, 30 Col. L. Rev. 1063.
12 1 Pollock & Maitland, *History of English Law* 74, 140-41 (2d ed. 1899).

Statute of Westminster,[13] 1275, provided that felons refusing to go to trial by "my country" were to be tortured and crushed until they accepted jury trial or died.[14] As trial by the court was the very thing that the accused did not want, it is only logical that it is not the least helpful to look for evidence supporting such a right in the history of the jury as a means to limit oppressive government. From the very nature of this struggle, it will be lacking, for opposition to the king included opposition to his judges. It appears from the English reports that no attempt has ever been made to waive a jury in the trial of serious offences.[15] The common law does not then give support for a legal right to the waiver of trial by jury.

Even accepting the "public benefit" test as suggested by Milvain, J., for determining when "may" changes into "must," it is unlikely that trial by judge alone as opposed to trial by jury can be shown to be for the public benefit. Perhaps this assumption was left inarticulate in Milvain's, J., judgment for good reason, as any discussion on the matter requires a resolution of the jury debate—an impossible task. In this debate the wide range of opinions about the jury vacillate from the most extravagant praise to the harshest criticism.[16] This means that, whichever test is used, s. 417 does not have the necessary requirements to contort a *prima facie* permissive power into an imperative one.

However, even assuming that the dichotomous nature of "may" could arise in the interpretation of s. 417, this does not mean that the rule in *Julius* v. *Oxford* (Bp.)[17] is the appropriate statutory construction to follow. Canadian Courts are not committed to any single approach to statutory interpretation.[18] It is generally accepted that there are at least three general rules of statutory construction open to the court; (i) the literal rule, (ii) the golden rule, (iii) the mischief rule.[19] The "literal rule" was stated by Lord Esher, M.R., in *R.* v. *City of London Court*:

> If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity.[20]

The "golden rule" was stated by Lord Weynsleydale in *Grey* v. *Pearson*:

> . . . in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless they would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further.[21]

To simply state the first two rules is to refute any possible contortion of "may" into "must."

Finally the "mischief rule" has been popular for divining legislative intent. The Barons of the Exchequer in *Hoydon's Case*,[22] in laying down rules for the "sure and true interpretation of all statutes in general," said in 1584 that "the mischief and defect which the statute was intended

13 3 Edw. 1, c. 12.
14 Plucknett, *A Concise History of the Common Law* 121-22 (4th ed. 1948).
15 Cf. *R.* v. *Perkins*, (1698) Holt 403; 90 E.R. 1122 (privilege of withdrawing a juror denied).
16 Klaven & Zeisel, *The American Jury* (1966)—for an excellent review of this book, especially relevant to this question, see (1967), 9 Crim. L. Q. 248.
17 *Loc. cit. supra*, n. 7.
18 Willis, *Statutory Interpretation in a Nutshell* (1938), 16 Can. Bar Rev. 1.
19 *Id.*
20 [1892] 1 Q.B. 273, 290.
21 (1857), 6 H.L.C. 61, 106.
22 (1584), 15 Co. Rep. 5a; 77 E.R. 1150.

to remedy should be regarded for the purpose of interpreting the law." The great controversy engendered by this rule is where and how the court is to ascertain and identify the mischief. It has been suggested that this rule is only a polite way of speculating as to what the court thinks is the social policy behind the Act. The result that this third rule would yield in construing s. 417 cannot be so easily stated. The apparent social policy behind judge trial is generally considered to be expediency. This is especially true of s. 417 which was a relic of early frontier days when it was very difficult to find competent jurors. The basis for such expediency has vanished today, and even if it had not, the high-minded English law would never allow expediency as authority for an accused's demand under s. 417 that he "must" be so tried. However, if the legislature was attempting by these sections to cure the defect of pre-trial publicity or undue prejudice on the part of jurors towards certain offenders, then the accused has a stronger case. Even accepting this unlikely speculation, its application would be rare and not sufficient grounds on which to determine the issue of whether s. 417 is mandatory or permissive. These statutory rules of construction thus make even less persuasive the semantic gymnastics employed by Milvain, J., to convert "may" into "must" in construing s. 417.

Another reason posited by Milvain, J., for restricting the discretionary power to refuse an election under s. 417 was simply that:

> If all judges were to exercise the discretion against the election of the accused it would, in effect, remove the power of Section 417 from the *Code* and I do not think it is the judicial function so to do.[23]

It is respectfully suggested that this reasoning is fallacious. It is to beg the very question in issue. Of course, if the power of a judge to try a case alone is permissive, by definition it may never be exercised. To argue that this possibility implies that the power is mandatory is to state the conclusion as a reason. In any event, it is not disputed that s. 417 is very frequently invoked. Its use has been almost without exception in trials for rape, manslaughter, and causing death by criminal negligence.[24] Therefore, this otherwise frequent invocation of s. 417 vitiates any suggestion that its disuse in capital murder cases would ever render its power nugatory and thus in effect repeal this provision of the *Criminal Code.*

The most cogent reason given by Milvain, J., for allowing Lyding's waiver of a jury on a capital murder charge was the fact that even a discretionary power must be exercised "on some judicial basis, that is, other than the mere distaste of the judge to try a case no matter what its nature."[25] This reasoning is squarely in accordance with the conventional jurisprudence on the limits of a judicial discretion. Although a power may be given entirely at the discretion of a judge, this does not give the judge licence to exercise that discretion capriciously.[26] Lord Denning, M.R., in *Ward* v. *James*,[27] where the discretion to allow trial by jury in personal injury cases was in issue, said:

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23 *R.* v. *Lyding* (1965), 54 W.W.R. 286, 290.
24 The court records for the District of Northern Alberta in 1966, show that for all of these offences there was not a single trial by jury.
25 *Op. cit. supra.* n. 23, at 289.
26 *R.* v. *Wilkes* (1769), 4 Burr. 2527, 2539, *per* Lord Mansfield; *Sharpe* v. *Wakefield*, [1891] A.C. 173, 179, *per* Lord Halsbury, L.C.
27 [1965] 1 All E.R. 563 (C.A.).

> The cases all show that, when a statute gives a discretion, the courts must not fetter it by rigid rules from which a judge is never at liberty to depart. Nevertheless the courts can lay down the considerations which should be borne in mind in exercising the discretion and point out those considerations which should be ignored. . . . From time to time the considerations may change as public policy changes, and so the pattern of decision may change. This is all part of the evolutionary process. We have seen it in the way that discretion is exercised in divorce cases. So also in the mode of trial. Whereas it was common to order trial by jury, now it is rare.

What then are the considerations that should be borne in mind by a judge exercising his discretion under s. 417? Milvain, J., pointed out in the *Lyding* case[28] that the personal "distaste" of a judge for trying a capital murder charge without a jury is not an acceptable judicial reason. However, when Manning, J., refused to allow Lyding's election he did so not because of his personal distaste of trying the case alone, but rather because it was the settled practice to decline to allow an election in these circumstances.[29] This is not very helpful because it still leaves us with the question of why it was settled practice. This is the question that Manning, J., did not answer. Surely the usual practice as to the exercise of this discretionary power is not of itself and without more a judicial reason for refusing an election to try the case by judge alone. It may well be that acceptable judicial reasons are very limited. In this regard, *Scott* v. *McCaffrey*,[30] an American case, is noteworthy. The defendant who was indicted with five co-defendants was not allowed to waive trial by jury, apparently on the grounds that it would bring about a severance. The New York Supreme Court, however, held that the state constitutional requirement of "court approval" concerns only the intelligence of the waiver. Where an intelligent waiver is found it must be allowed by the trial judge. In *Adams* v. *U.S.*,[31] where the factors constituting an effective waiver were in issue, the Supreme Court of the United States held that even the fact that the jury had been waived without the help of advice of legal counsel was not a judicial reason for refusing to allow the waiver. The Court said that the only relevant factors were the intelligence of the defendant's waiver and the complexity of the charge. This reasoning is very persuasive and applied to s. 417 it means that the possible "judicial reasons" for refusal of an election under that section reduce a supposedly discretionary power to but one alternative.

Conclusion

It appears that in answer to the question of whether a defendant in a criminal case has the absolute right under s. 417 to waive a jury trial, the better view is that he has not. The right to a jury trial is not the right to be tried without a jury. The Court has a discretion to refuse such a waiver. This conclusion is based on the rejection of the artificial rule of statutory interpretation that "may" equals "must" as posited by Milvain, J., in the *Lyding* case,[32] first, on the grounds that the wrong test was used to effectuate the rule and, secondly, because, even applying the correct test, the circumstances of the waiver of a jury are not within its ambit. Divining the legislative intent by the literal, golden and mischief rules has also supported a discretionary power in the judge to refuse a waiver of jury.

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28 *Op. cit. supra*, n. 23, at 289.
29 *Op. cit. supra*, n. 23, at 288.
30 (1958), 139 N.Y.L.J. No. 63, 1, Col. 8.
31 (1942), 317 U.S. 269; see note in (1943), 55 Harv. L. Rev. 1209.
32 *Loc. cit. supra*, n. 3.

This is not to forget, however, that this discretionary power can only be exercised on some judicial basis, which is simply whether the accused has given his express and intelligent consent. Beyond non-compliance with these two conditions it is difficult to conceive of any possible judicial reason for refusing an election under this procedural relic of our frontier days in Alberta. The result may well be, therefore, that the power to waive a jury trial is discretionary only in theory, because the practical consequences of the fact that there are very limited judicial reasons for exercising this discretion will necessarily mean that it is mandatory.

It is foreseeable that if this approach to the interpretation of s. 417 is followed by the Courts then the trend will clearly be towards even fewer jury trials. There have, in fact, been some capital murder cases tried without a jury subsequent to the *Lyding* case.[33] The criminal jury trial could well become as rare in Alberta as the civil jury trial is. This leaves us with a simple question: do we want this to happen? Has the value of the jury as a fact finding body in criminal cases been sufficiently established to justify the legislature in taking steps to prevent its extinction in Alberta? The answer to this question will also answer the question of whether we should retain s. 417 as part of our criminal procedure.

—J. G. MATKIN*

33 In at least three capital murder cases (unreported) subsequent to the *Lyding* case, where an election has been made under s. 417, the Court has allowed the same: *R.* v. *Whitford* (1965); *R.* v. *Kniess* (1967); *R.* v. *Ranch* (1967).

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COMPANIES—ULTRA VIRES DOCTRINE—HISTORY AND CURRENT STATUS—LEGISLATIVE CHANGE—*H. & H. LOGGING CO. LTD. AND ATTORNEY GENERAL OF BRITISH COLUMBIA* v. *RANDOM SERVICES CORPORATION.*

The recent decision of The Appellate Division of the Supreme Court of British Columbia in *H. & H. Logging Co. Ltd. and Attorney General of British Columbia* v. *Random Services Corporation*[1] may well be a portent of death for the doctrine of *ultra vires* in company law. In an oral judgment, Bull, J.A., (McFarlane and Branco, JJ.A., concurring) reversed the trial decision[2] and gave full literal effect to a subjectively worded object clause in the appellant company's memorandum of association. The clause provided that, in addition to the objects specified, the company was empowered ". . . generally to carry on *any other* business *which the company may consider* can be conveniently carried on in connection with the business of the company" [italics added]. Consequently, this case indicates that with proper drafting companies may endow themselves with the capacity to engage in whatever business activity may strike their fancy. The decision as to whether a particular activity is effectively connected with company business rests with the opinion of the company itself; hence, all restrictions of the *ultra vires* doctrine are extinguished.

1 [Sept. 23,] (1967), 60 W.W.R. 619; hereafter cited as *Random Services.*

2 (1966) 56 W.W.R. 51.