H. C. OF A. 1922.

SOUTH AUSTRALIAN LAND MORTGAGE AND AGENCY CO. LTD. v. THE KING.

proper performance by the Court of its above-mentioned duty. The Land Appeal Court has the same powers as the Land Court for the purposes of an appeal." Order affirmed in other respects. Case remitted to Land Appeal Court with the opinion of this Court. In Law Debenture Corporation Ltd. v. *The King and Manifold and Others* v. *The King—Appeal dismissed with costs.*

Solicitors for the appellants, *Cannan & Peterson*, Brisbane.

Solicitor for the respondent, *W. F. Webb*, Crown Solicitor for Queensland.

B. L.

[HIGH COURT OF AUSTRALIA.]

HUNTLEY . . . . . PLAINTIFF;

AGAINST

ALEXANDER . . . . . DEFENDANT.

H. C. OF A. 1922.

MELBOURNE, *May* 10, 15.

ISAACS J.

IN CHAMBERS.

Practice—High Court—Jury—Order for trial with jury—Discretion—Action for breach of promise of marriage and seduction—High Court Procedure Act 1903-1921 (*No.* 7 *of* 1903—*No.* 35 *of* 1921), *secs.* 12, 13—*Rules of the High Court* 1911, *Part I., Order XXXIII., r.* 2.

The fact that an action in the High Court is one for breach of promise of marriage and seduction is not in itself a ground for ordering that the action be tried with a jury.

Gardner v. *Jay*, (1885) 29 Ch. D., 50, applied.

SUMMONS.

An action was brought in the High Court by Eva Huntley, a resident of Victoria, against William Telford Alexander, a resident

of New South Wales, by which the plaintiff claimed £2,000 damages for breach of promise of marriage and seduction. The plaintiff applied by summons for an order that the trial of the action be with a jury of six men. The summons was heard by *Isaacs* J.

Power, for the plaintiff.

The managing clerk of the defendant's solicitors, for the defendant.

Cur. adv. vult.

May 15.

ISAACS J. read the following judgment :—This is an application on summons by the plaintiff under Order XXXIII., r. 2, for an order that this action be tried with a jury. By sec. 12 of the *High Court Procedure Act* it is enacted that "in every suit in the High Court, unless the Court or a Justice otherwise orders, the trial shall be by a Justice without a jury." That is, the normal course as prescribed by the Commonwealth Parliament is to try *every* suit by a Justice without a jury ; to alter this course an order is required. Sec. 13 enacts that " the High Court or a Justice may, in any suit in which the ends of justice appear to render that mode of inquiry expedient, direct the trial with a jury of the suit or any issue of fact," &c. Then by Order XXXIII., r. 2, it is provided that " any party to a suit may within ten days after notice of trial has been given, or within such extended time as the Court or a Justice allows, apply to the Court or a Justice for a trial with a jury of the suit or of any issues of fact, and the Court or Justice may if they think fit direct a trial with a jury of the suit or issues accordingly," &c.

This suit is for breach of promise of marriage and seduction. The defendant denies the promise and the seduction. The plaintiff is a resident of Victoria, the defendant a resident of New South Wales, and the writ is issued from the Melbourne Registry. No place of trial is named in the writ. The defendant objects to the application being granted.

Learned counsel for the plaintiff urged that the nature of the action was sufficient, and that the State practice in this respect should be followed. It is the law of the Commonwealth that must be followed ;

H. C. OF A. 1922.

HUNTLEY v. ALEXANDER.

Isaacs J.

and I have stated the relevant provisions. As to sec. 13 of the Act, no circumstance has been proved or alleged or suggested to indicate to me that the ends of justice appear to render it expedient to have the case tried with a jury. It has not been argued whether that section is the guide intended by Parliament to modify sec. 12. I, therefore, for the purposes of this application assume that under the words "think fit" in Order XXXIII., r. 2, I have the widest judicial discretion those words unrestricted by sec. 13 can give. On this assumption I accept as correct the judgment of *Bowen* L.J. in *Gardner* v. *Jay* (1), where he said:—"Now Order XXXVI., rule 3, gives the Court discretion to decide upon the mode of trial in a class of cases of which this is one. That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed, but still it is a discretion, and for my own part I think that when a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the Judge why should the Court do so? As to *Cardinall* v. *Cardinall* (2), though it is very convenient that a Judge of first instance, who is going to exercise the discretion in these cases from day to day, should indicate to those who are practising before him the kind of way in which his mind operates on such questions, still when he does so he is not laying down a rule of law nor fettering his own discretion, and, *à fortiori*, although it is of great value to hear anything that such a master of practice as Mr. Justice *Pearson* says on such a subject, he cannot fetter the discretion of another Judge where the rule has left the discretion open. If it were wished to lay down rules as to how a Judge should act about sending cases to be tried by jury, I do not think that anything could be laid down more definite than this, that as the mode of trial by jury differs in many respects, which lawyers know, from trials before a Judge without a jury, the Judge must carefully consider what those differences are, and what are the facilities for trial in

(1) (1885) 29 Ch. D., 50, at pp. 58-59. (2) (1884) 25 Ch. D., 772.

the one case and in the other, and then apply his mind to the facts of the special case and see how the case can be most justly and most conveniently tried. In this particular case it seems to me that the onus has not been satisfied by the appellant. He has not shown us in the first place any good reason why this case should not be tried in Chancery, and certainly he has not satisfied us that the discretion of the Judge below was wrongly exercised."

Acting on the lines there laid down, I find nothing in the materials before me to satisfy my mind that I ought to exercise my discretion in departing from the *primâ facie* statutory provision in sec. 12 of the Act. On the contrary, I am satisfied that it is more just and convenient that the case should be tried by a Justice without a jury.

The summons is dismissed. Defendant to have costs fixed at 10s. 6d. Certify for counsel.

Order accordingly.

Solicitor for the plaintiff, *C. J. Macfarlane.*

Solicitors for the defendant, *Whiting & Aitken* for *A. H. Windeyer*, Deniliquin.

B. L.