[HIGH COURT OF AUSTRALIA.]

McDERMOTT . . . . . PLAINTIFF;

AND

COLLIEN AND ANOTHER . . . . DEFENDANTS.

H. C. OF A. 1953.

MELBOURNE. *Aug.* 5, 7.

Fullagar J.

High Court—Original jurisdiction—Mode of trial of action—High Court Procedure Act 1903-1950 (*No.* 7 *of* 1903—*No.* 80 *of* 1950), *ss.* 12, 13—*High Court Rules* (*S.R.* 1952 *No.* 23)—*O.* 36 *rr.* 3, 4, 5.

Trial without a jury is the normal mode of trial of actions in the High Court of Australia and some special reason must be shown for a departure in any particular case from that normal mode. It is not sufficient to show that a cause of action is of a kind which could properly be tried with a jury, and which was normally tried with a jury in England before the *Judicature Act* 1873, although the nature of the cause of action may be a relevant matter for consideration.

ACTION.

Peter Joseph McDermott of Caulfield, Victoria, on 17th February 1953, commenced an action as plaintiff in the High Court of Australia against K. Collien and J. Luff, both of Gundagai, New South Wales, as defendants. The nature of the action and of the present application are sufficiently set out in the judgment hereunder.

Dr. *S. H. Z. Woinarski*, for the plaintiff.

R. K. Fullagar, for the defendants.

Cur. adv. vult.

Aug. 7.

FULLAGAR J. delivered the following written judgment:

This is a summons by a plaintiff asking that his action be tried by a justice with a jury of six men. The plaintiff is a resident of the State of Victoria, and the defendants are residents of the State of New South Wales. The claim arises out of an alleged sale by the defendants to the plaintiff of a motor car for the price of £1200.

The plaintiff alleges an express condition, and also relied upon conditions implied by statute that the car should be reasonably fit for the purpose of being used as a motor car and that it should be of merchantable quality. He alleges breaches of these conditions. He claims that he rejected the goods, and on that basis seeks to recover the sum of £1150 paid by him to the defendants and also certain damages representing expenses incurred by him before the rejection of the car. Alternatively, he relies upon the alleged conditions as warranties and claims damages. The defence denies the express condition and the implied conditions, denies breach, and alleges that the plaintiff accepted the goods.

The provisions material to an application of this kind are contained in the *High Court Procedure Act* 1903-1950 and in O. 36 of the *High Court Rules*. Section 12 of the *High Court Procedure Act* provides 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. Section 13 provides 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.

Order 36, r. 3, of the *High Court Rules* provides that in every proceeding the mode of trial shall be by a justice without a jury unless the Court or a justice otherwise orders. This appears merely to repeat s. 12 of the *High Court Procedure Act*. Rule 4 provides that a party to a proceeding may at any time, not (unless the Court or a justice otherwise orders) being less than fourteen clear days before the date for which notice of trial has been given, apply to the Court or a justice for an order under s. 13 of the *High Court Procedure Act* 1903-1950 for trial with a jury. Rule 5 provides that if, in a proceeding, it appears to the Court or a justice before or at the trial that an issue of fact could be more conveniently tried before a justice with a jury, the Court or justice may direct that it shall be so tried and may for that purpose vary a previous order.

These rules differ in terms from the rules formerly in force as O. XXXIII., rr. 2 and 3. The old r. 2 provided that the Court or a justice might, " if they think fit ", order a trial with a jury. This might be thought to have conferred a wider discretion than s. 13 of the *High Court Procedure Act*. The old r. 3 dealt only with a case where a cause or matter had been set down for trial before a justice without a jury, and purported to authorise an order for trial with a jury if it appeared to the Court or a justice that any issue of fact could be more conveniently tried with a jury. In

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Henry v. *Commonwealth* (1), *Rich* J., after referring to ss. 12 and 13 of the *High Court Procedure Act*, said: "Rule 2 of Order XXXIII. cannot extend or limit the discretion so conferred." Accordingly I treat the present application as being made under O. 36, r. 4, and as depending upon its being made to appear to me that the ends of justice render that mode of inquiry expedient within the meaning of s. 13 of the *High Court Procedure Act*. I would add that I do not know that there is any real difference in meaning between the language used in s. 13 and the expression "more conveniently tried", which occurs in O. 36, r. 5, and I should have reached the same conclusion if I had thought that the provision which I had to apply was O. 36, r. 5.

There appear to be only two reported applications of this nature. The first was the case of an application made to *Isaacs* J. in the case of *Huntley* v. *Alexander* (2). In that case the action was for seduction and breach of promise of marriage. This type of action has generally been considered one pre-eminently suitable for trial with a jury, but *Isaacs* J. considered that no reason appeared for any departure from the general rule that in this Court the normal mode of trial shall be without a jury. Accordingly, he refused the application. It may be noted that in *Proud* v. *Ferguson* (3), *Hodges* J. refused to order an assessment of damages by a jury in an action for breach of promise of marriage. The discretion under the *Rules of the Supreme Court* 1906 (Vict.) was possibly wider than that given by the *High Court Procedure Act*. His Honour said that the Court or a judge has a discretion under the rule to direct the ascertainment of damages otherwise than by the Prothonotary, "and, unless some special circumstances exist, there is nothing on which the Court can exercise any discretion" (4). It might perhaps have been thought that the fact that in such actions damages are very much at large, and may include a "*solatium*", provided a reason for thinking that a jury was the best tribunal to undertake the assessment. And in *Long* v. *Commercial Travellers' Association of Victoria* (5), *Cussen* J. said that he would probably have decided the other way in *Proud* v. *Ferguson* (3). *Hood* J., however, expressed his agreement with *Hodges* J.

The other reported case in this Court is *Henry* v. *Commonwealth* (6). Again the application was refused. *Rich* J., in the course of his judgment, refers to an unreported decision of *Evatt* J. in a case

(1) (1937) A.L.R. 409, at p. 409.
(2) (1922) 30 C.L.R. 566.
(3) (1913) V.L.R. 129.
(4) (1913) V.L.R., at p. 130.
(5) (1917) V.L.R. 278.
(6) (1937) A.L.R. 409.

in which also the application was refused. In *Henry's Case* (1) I should have thought that the nature of the action made it peculiarly unsuitable for trial with a jury.

The nature of the question involved is such that one can hardly expect much guidance from decided cases. Two things, however, seem clear enough. The first is that with the merits and demerits of trial by jury as a means of determining civil causes I have nothing whatever to do. Dr. *Woinarski* referred me to the observations of *Bankes* L.J. and *Atkin* L.J. (as he then was) in *Ford* v. *Blurton* (2), which are quoted by *Lush* J. in *Calcraft* v. *London General Omnibus Co. Ltd.* (3). But, so far as any question of general policy is involved, it is settled for me by the *High Court Procedure Act*. Trial without a jury is the normal mode of trial of actions in this Court, and some special reason must be shown for a departure in any particular case from that normal mode. The second thing that seems clear is that it is not enough to show that the cause of action is of a kind which could quite properly be tried with a jury and which was normally tried with a jury in England before the *Judicature Act* 1873 (36 & 37 Vict. c. 66). The decisions of *Hodges* J. and of *Isaacs* J. perhaps suggest that the nature of the cause of action is not even a relevant consideration. I would not be prepared to assent to that as a general proposition : indeed I would rather have thought that it might in some cases be a potent consideration. But it is clear that it is not enough to say : " This is a kind of action which is quite suitable for trial with a jury, and I would like to have it tried with a jury."

The plaintiff in this case cannot, in my opinion, say more than that. It seems to me that it is a complete answer to him for the defendant to say : " This is a kind of action which is also quite suitable for trial without a jury." I am disposed indeed to think that the present case is more suitable for trial without a jury than for trial with a jury. Dr. *Woinarski* suggested that members of a jury were more likely than a judge to be familiar with motor cars—perhaps he was thinking of motor cars commanding a price of £1200—and with their habits and qualities and with what constitutes virtue and vice in a motor car. I cannot think that there is anything in this. And when it comes to questions of implied conditions and the circumstances which will give rise to an implication, and to the question whether there has been an acceptance of goods purchased, questions of law are likely to be so interwoven with

(1) (1937) A.L.R. 409.
(2) (1922) 38 T.L.R. 801, at pp. 803, 804.
(3) (1923) 2 K.B. 608, at p. 612.

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questions of fact as to make it probably, on the whole, better and more convenient that the whole case should be determined by a justice sitting alone. But, however this may be, I find it impossible, looking at the matter from the point of view of "the ends of justice", to say that there is any advantage in having this case tried with a jury.

The summons must be dismissed.

Summons dismissed with costs. Certify for counsel.

Solicitor for the plaintiff: *Graham Scouller.*
Solicitors for the defendants: *Moule Hamilton & Derham.*

R. D. B.