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Nor could it make any difference if, under clause 16, Ancell had bought. But, if so, the same reasoning must apply to clause 15.

The judgment of the Supreme Court, therefore, in our opinion, is wrong ; the appeal should be allowed, and the answer should be that the will does not prescribe how the purchase money shall go. The executor holds it in trust for the next of kin according to law.

Appeal dismissed. Judgment of the Supreme Court affirmed. No order as to costs, except declare that executor is entitled to costs as between solicitor and client out of the estate. Deposit to be refunded.

Solicitors for the appellants, *Downing & Downing.*
Solicitors for the respondent, *Stone, James & Pilkington.*

[HIGH COURT OF AUSTRALIA.]

THE MINISTER FOR HOME AND TERRITORIES . . . . . PLAINTIFF ;

AND

TEESDALE SMITH AND ANOTHER . . DEFENDANTS.

H. C. OF A. 1920.

ADELAIDE, *July* 9.

MELBOURNE, *Aug.* 17.

Starke J.

Arbitration—Submission—Award—Rule of Court—Jurisdiction of High Court.

In respect of an arbitration the only authority for which is the agreement of the parties to it, the High Court has no jurisdiction to make either the submission or the award a rule of Court.

A disputed claim for compensation in respect of land compulsorily acquired by the Commonwealth had arisen and, an application by the Minister for Home and Territories to the High Court to determine the claim having been

stayed at the request of the claimant, the claim was, by agreement, referred to the arbitration of a Justice of the High Court to be nominated by the Chief Justice.

Held, that neither the submission nor the award thereon could be made a rule of the High Court.

MOTION.

The Commonwealth having acquired certain land in South Australia belonging to Henry Teesdale Smith and Simon Matheson by compulsory process under the *Lands Acquisition Act* 1906, Smith and Matheson made claims for compensation, which became a disputed claim for compensation under the Act. The Minister thereupon, by originating summons, applied to the High Court to determine the claim, but at the request of Smith and Matheson the application was stayed and an agreement was entered into between the parties to refer the claim to the award and final determination of a Justice of the High Court to be nominated for that purpose by the Chief Justice. The arbitration was accordingly held before *Powers* J., who, on 18th February 1920, made his award: *Arbitration between Teesdale Smith and Minister for Home and Territories* (1).

The Minister now applied to have the award made a rule of Court.

Ward, for the Minister, in support.

Brown, for the claimants, to oppose.

[During argument reference was made to *Redman on Arbitration*, 1st ed., p. 21; 9 & 10 Will. III. c. 15; *Russell on Arbitration*, 4th ed., p. 50; *Nichols* v. *Chalie* (2); *Lyall* v. *Lamb* (3); *Lucas* v. *Wilson* (4); *Owen* v. *Hurd* (5); *Steers* v. *Harrop* (6); *Davis* v. *Getty* (7); *Arbitration Act* 1891 (S.A.); *Buse* v. *Roper* (8); *In re Aylmer*; *Ex parte Bischoffsheim* (9); *Lewis* v. *Healing* (10).]

Cur. adv. vult.

(1) *Ante*, 513.
(2) 14 Ves., 265.
(3) 4 B. & Ad., 468.
(4) 2 Burr., 701.
(5) 2 T.R., 643.
(6) 1 Bing., 133.
(7) 1 Sim. & St., 411.
(8) 41 L.T., 457.
(9) 19 Q.B.D., 33.
(10) 1 L.J. Ch., 154.

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MINISTER FOR HOME AND TERRITORIES v. SMITH.

Aug. 17.

STARKE J. read the following judgment:—The Commonwealth acquired certain land belonging to Henry Teesdale Smith and Simon Matheson in South Australia by compulsory process pursuant to the *Lands Acquisition Act* 1906. Smith and Matheson made claims for compensation, and a "disputed claim for compensation" arose.

The Minister for Home and Territories, pursuant to sec. 38 of the Act, applied to this Court to determine the claim. However, at the request of the claimants, the application to this Court was stayed, and it was agreed on 11th December 1918 to refer the claim "to the award and final determination of a Justice of the High Court to be nominated for that purpose by the Chief Justice." This agreement provided that the *Arbitration Act* 1891 of the State of South Australia should not apply, and that the submission should have the same effect in all respects as if it had been made a rule of the High Court. The Chief Justice nominated my brother *Powers* as sole arbitrator, and he made an award dated 18th February 1920.

Motion was made on behalf of the Minister to make the award a rule of this Court, but at the hearing before me the learned counsel who appeared for the Minister enlarged his motion, with my sanction, and sought to make the submission or agreement of 11th December 1918 a rule of this Court. The question is whether the Court has jurisdiction to make the order sought. No express statutory power or rule of the Court warranting such an order was relied upon, but it was contended that the *Lands Acquisition Act* contemplated the reference of claims under that Act to arbitration (secs. 36 (*a*), 37 (*b*), 38 (*b*)), and that the Court had inherent power to make the order. The Courts of common law and the Court of Chancery did, no doubt, by consent, in pending actions make references of disputes. "Such orders were in fact submissions to arbitration embodied by consent in orders of the Court" (see *Fraser* v. *Fraser* (1)). And the parties were then "obliged to submit to the award of the arbitrators under the penalty of imprisonment for their contempt in case they refuse submission" (see preamble to 9 & 10 Will. III. c. 15).

But "when persons were out of Court they could not by any

(11) (1905) 1 K.B., 368, at p. 372.

agreement bring themselves into Court and create jurisdiction to issue process of contempt" (*Russell on the Law of Submissions and Awards*, 6th ed., p. 55; *Nichols* v. *Chalie* (1); *Lyall* v. *Lamb* (2) and *Steers* v. *Harrop* (3)). Several statutes were passed in England to meet this difficulty and to improve the law (see 9 & 10 Will. III. c. 15; 3 & 4 Will. IV. c. 42; 17 & 18 Vict. c. 125, sec. 17 (*Common Law Procedure Act*); 52 & 53 Vict. c. 49 (*Arbitration Act*)). Even to-day parol submissions cannot be made and have not the effect of rules of Court. The Australian States have followed this legislation in the main, but it finds no counterpart in Federal legislation. In the present case there was no reference by order of the Court. The parties stayed the proceedings in Court and submitted the dispute by their own agreement to an arbitrator nominated by the Chief Justice, who, in making his nomination, performed no function appertaining to his office but simply acted as a person designated by the parties. The Courts of common law had no inherent jurisdiction to order that submissions made out of Court should be rules or orders of the Court. The High Court is created by, and its jurisdiction and powers are conferred solely by statute. Its inherent jurisdiction is not larger, as to the matter in hand, than the Courts of common law.

An action can, I apprehend, be brought to enforce the award of my brother *Powers* in a Court of competent jurisdiction; but neither the submission nor the award can, in my opinion, be made a rule of this Court. The motion is dismissed with costs.

Motion dismissed with costs.

Solicitors for the plaintiff, *Fisher, Ward, Powers & Jeffries*, for *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the defendants, *Symon, Browne, Symon & Povey.*

B. L.

(1) 14 Ves., 265.

(2) 4 B. & Ad., 468.

(3) 1 Bing., 133.

[*Note.*—As to this case, see now *Judiciary Act* 1920 (No. 38 of 1920), sec. 4.—*Ed. C.L.R.*]