[HIGH COURT OF AUSTRALIA.]

DRAKE-BROCKMAN AND ANOTHER . . APPELLANTS;
DEFENDANTS,

AND

GREGORY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1920.

PERTH, *Sept.* 8, 9, 15.

KNOX C.J., ISAACS, GAVAN DUFFY AND RICH JJ.

Will—Construction—Share in partnership—Gift by will—Condition—Election to purchase under partnership deed—Intestacy.

By his will a testator, who was a partner in a trading firm with his brother, bequeathed to the latter his share in the partnership business on condition that the brother should pay yearly a portion of testator's share in the profits of the business to his mother, his wife, or, on the latter's death or re-marriage, to his daughter; the remaining portion was to be retained by the brother, who was appointed executor of the will. The brother, in pursuance of a right contained in the partnership deed, elected to purchase the testator's share in the assets of the partnership.

Held, by *Knox* C.J. and *Gavan Duffy* J., that there was no intestacy by reason of the election of the executor to purchase: that the gift of the share operated as a gift to the executor of the amount payable by him as the purchase money of the share and operated to pass to him the purchase money with no further burdens than he was content to assume.

By *Isaacs* and *Rich* JJ.: (1) whether the gift was taken in its primary or its secondary form, the condition on which it was offered must be observed; (2) but as the executor had elected to purchase and had purchased the share under the partnership deed, independently of the will, he necessarily rejected the gift; (3) the gift thereby entirely failing, there was an intestacy as to the share.

Decision of the Supreme Court of Western Australia: *In re Gregory*, 22 W.A.L.R., 19, affirmed.

H. C. OF A. 1920.

DRAKE-BROCKMAN v. GREGORY.

APPEAL from the Supreme Court of Western Australia.

By a deed of partnership in a pearling business carried on under the firm name of Gregory & Co., made on 27th January 1915 between Ancell Clement Gregory and his brother Fleming Clement Gregory (now deceased), it was agreed (*inter alia*) that in the event of the death of either of them the surviving partner might, if he so desired, purchase the deceased partner's share in the capital and assets of the partnership. By his will, dated 12th November 1915, Fleming Clement Gregory provided (so far as material) as follows :—" Any moneys due to me or arising from my insurance policies with the A.M.P. Society I leave absolutely to my wife Alice Gregory of Perth W.A. and in case of her death or remarriage to my daughter Patricia with the wish that she will invest such in the firm of Gregory & Co. pearlers and traders of Broome. My share in the registered trading company Gregory & Company of Broome W.A. I leave to my brother Captain A. C. Gregory of Broome W.A. on condition that he pays one-quarter of my share in the profits yearly to my mother S. Henson during her life, one-half of my share in the profits to be paid to my wife Alice during her life. This one-half to revert to my daughter Patricia on my wife's death or remarriage and in case of the death of both to revert to my brother Captain A. C. Gregory. The other one-quarter to be retained by my brother Captain A. C. Gregory of Broome W.A. whom I appoint sole executor of this my will and guardian of my daughter Patricia." Ancell Clement Gregory had elected to purchase the share of the deceased in Gregory & Co. The testator's widow had remarried.

An originating summons was taken out by Ancell Clement Gregory for the determination of certain questions that had arisen in the administration of the testator's estate. On the hearing of the summons the following questions (*inter alia*) were referred to the Full Court :—

(*b*) Whether in view of the fact that the executor (as co-partner of the deceased) has elected to purchase the deceased's share in the partnership of Gregory & Co. there is an intestacy in respect of that share.

(*c*) If no such intestacy, then (i) whether that share is vested in the executor absolutely subject only to the payment to S. Henson

and the widow and daughter and what interest the daughter takes; (ii) whether that clause is or is not conditional and contingent on the executor continuing the partnership and dividing the profits as therein mentioned, and if it be conditional what is the effect of the executor having elected to purchase the deceased's share in the partnership.

The Full Court decided question (*b*) in the negative: the partnership was dissolved by the death of the testator, and he must be taken to have known that would be so; the share of the deceased in the partnership was therefore a share in the assets of the partnership after providing for all the debts and liabilities thereof, and that it is which is the subject of the bequest relating to such share. In answer to question (*c*) (i) the Court decided that in the events which have happened one-half of the testator's share in the partnership of Gregory & Co. vests in the executor absolutely subject only to the payment to S. Henson during her life of the share of the profits mentioned in the will, and the other half vests in him upon trust for the daughter of the deceased. In view of the foregoing answers, no answer was given to question (*c*) (ii):—*In re Gregory* (1).

The testator's widow (Alice Drake-Brockman) and his infant daughter Patricia Gregory (by her guardian *ad litem*, Edward Arthur Griffith), the defendants, now appealed to the High Court from the decision of the Supreme Court.

Downing, for the appellants. The provision in the will in respect of the disposition of the share in the trading business was made on the assumption that the executor would continue to carry on the business as owner of part of it and as executor in respect of the other part; this is clear from the words the testator uses in disposing of it and also from the wish he expresses in the preceding clause as to the investment of the insurance policy moneys. The Supreme Court dealt with the case on the principle that if an interest in or proceeds of money are devised without any reference to time, the bequest is only as to profits, not as to the share itself. There is no residuary gift in the will, and the money produced by the sale of the testator's interest in the partnership goes as on intestacy to the wife and daughter.

(1) 22 W.A.L.R., 19.

H. C. OF A. 1920.

DRAKE-BROCKMAN v. GREGORY.

[ISAACS J. The rights of the parties under the will are as to the unpurchased share. As to profits see *Nicol* v. *Chant* (1), and see *Beddington* v. *Baumann* (2) as to the interpretation of a will.]

The gift of the produce of a share for an indefinite term is not a gift of the share (*Hawkins on Wills*, 2nd ed., p. 162 ; *In re Lawes-Wittewronge* ; *Maurice* v. *Bennett* (3).

[RICH J. referred to *Vyse* v. *Foster* (4) ; *Hordern* v. *Hordern* (5).]

Pilkington K.C. and *Leake*, for the respondent. The option of the executor was to purchase as at the date of the death of his partner. From that date he was the owner of the whole business (*Partnership Act* 1895 (W.A.), sec. 55 (1), (2)). Here the option has been duly exercised, and he is not bound to do more than pay interest from the date of the testator's death. As to the construction of the will, the words " my share in the registered trading company " cannot mean literally his share in the partnership, because the partnership is ended. " Share " does not necessarily import that the partnership business is to be carried on. " On condition " imports the creation of a trust. " My share " covers share in the net assets whether of a going concern or in liquidation. There was an option, and what the testator proposed to deal with was subject to an option given prior to the date of the will. That imports a gift of the proceeds of the option, if the option be exercised. [Counsel referred to *In re Pyle* ; *Pyle* v. *Pyle* (6).] A gift of the share would carry the sum realized on sale ; it is immaterial whether the sale is to an outsider or to the executor: the sum which the share realizes at sale can, in either case, be clothed with the same trust. The beneficiaries the testator had in mind were his mother, his wife until remarriage and his daughter : on the respondent's construction those three will be benefited in accordance with his general intention ; otherwise, if it goes as on intestacy, the mother gets nothing, and the wife, who has remarried, gets more than an interest till marriage. The will does not give the power to the executor to carry on the business (*Lindley on Partnership*, 7th ed., p. 676). Whatever his rights under the will, the respondent is content to waive his legal position as to one-half.

(1) 7 C.L.R., 569.
(2) (1903) A.C., 13, at pp. 17, 20.
(3) (1915) 1 Ch., 408, at pp. 412-413.
(4) L.R. 7 H.L., 318.
(5) (1909) A.C., 210.
(6) (1895) 1 Ch., 724.

Downing, in reply, referred to the *Administration Act* 1903 (W.A.), sec. 14; *In re Pyle*; *Pyle* v. *Pyle* (1); *In re Edwards*; *Jones* v. *Jones* (2).

Cur. adv. vult.

The following judgments were read :—

KNOX C.J. AND GAVAN DUFFY J. This is an appeal from a judgment of the Full Court of Western Australia on an originating summons raising certain questions as to the construction of the will of Fleming Clement Gregory. The main question for our determination is as to the disposition of a sum of money, not yet ascertained, representing the amount payable by the plaintiff (Ancell Clement Gregory) as purchase money of the share of the testator in the business formerly carried on by them in partnership. This business was carried on under a deed of partnership dated 27th January 1915, the relevant provisions of which are as follows :—" 1. The partnership shall be deemed to have commenced as on the first day of January 1915 and shall continue until terminated in manner herein provided." " 6. The net profits of the business shall belong to the partners in the following proportions, that is to say, the said Ancell Clement Gregory two-thirds and the said Fleming Clement Gregory one-third and they shall in like proportion bear all losses including loss of capital." " 15. In the event of death of either partner the surviving partner may if he so desires purchase the share of the deceased partner in the capital and assets of the partnership upon giving to the representatives of the deceased partner or if they cannot be found to the clerk of Courts, Broome, notice of such intention. The price to be paid shall be the value thereof as standing in the books and disclosed by a balance-sheet to be drawn up for the purpose. 16. If the surviving partner shall not exercise the option of purchasing the share and interest of the deceased or the other partner as herein provided or if the partnership shall be determined or expire during the joint lives of the partners the partnership shall be wound up and the assets distributed as provided by the *Partnership Act* 1895 but each partner shall be entitled to bid at any sale of such assets by public auction."

(1) (1895) 1 Ch., at p. 727. (2) (1906) 1 Ch., 570, at p. 574.

H. C. OF A. 1920.

DRAKE-BROCKMAN v. GREGORY.

KNOX C.J. GAVAN DUFFY J.

It is common ground that since the death of the testator the plaintiff has duly given notice of his intention to exercise the option of purchase conferred on him by clause 15 of the deed, but the price to be paid by him has not yet been ascertained. The will of the testator, after certain bequests which are not now in controversy, proceeds as follows :—" My share in the registered trading company Gregory & Company of Broome W.A. I leave to my brother Captain A. C. Gregory of Broome W.A. on condition that he pays one-quarter of my share in the profits yearly to my mother S. Henson during her life, one-half of my share in the profits to be paid to my wife Alice during her life. This one-half to revert to my daughter Patricia on my wife's death or remarriage and in case of the death of both to revert to my brother Captain A. C. Gregory. The other one-quarter to be retained by my brother Captain A. C. Gregory of Broome W.A. whom I appoint sole executor of this my will and guardian of my daughter Patricia."

The main question raised in argument may be stated thus : On the true construction of the will does the gift of " my share in the registered trading company Gregory & Company of Broome W.A." operate as a gift of the amount payable by the plaintiff as the purchase money of the share ? The Full Court answered this question in the affirmative, holding that the plaintiff was entitled under the will to one-half of this amount subject to the payment to Mrs. Henson during her life of one-half of the interest accruing thereon and to the remaining one-half in trust for Patricia, the plaintiff having relinquished any claim he might have to the corpus of the last mentioned moiety. The appellant challenges the correctness of this decision, while the plaintiff is content with it and asks no alteration of the judgment. We are clearly of opinion that the bequest to the plaintiff operates to pass to him the sum of money in question, and that the will imposes no further burdens on him than those which he is content to assume. Under these circumstances it is unnecessary to consider whether the plaintiff is entitled to more than the judgment gives him.

On the question whether this portion of the judgment is correct this Court is equally divided, and consequently, under sec. 23 of the *Judiciary Act*, the decision appealed from must be affirmed.

The only other question was as to the profits made in the business since the death of the testator, and as to this we need say no more than that having regard to the provisions of sec. 55 (2) of the *Partnership Act* the decision of the Full Court was in our opinion clearly right.

ISAACS AND RICH JJ. (read by ISAACS J.). This case exemplifies the propriety of applying the principles stated by *Turner* L.J., for the Privy Council in *Doe d. Brodbelt* v. *Thomson* (1), in the following words :—" It is upon intention, either expressly declared or collected by just reasoning upon the terms of the instrument, or evidenced by surrounding circumstances, where surrounding circumstances can be called in aid, and not upon conjecture merely, their Lordships feel bound to proceed. The strict observance of this rule, unimportant as it may be in particular cases, is of the highest importance, when considered generally, with reference to the rights of property; for if it be not strictly observed, those rights will become dependent upon the mere arbitrary will of the Judges whose duty it may be to adjudicate upon them." Whatever the consequence may be in this particular case, we feel constrained judicially to adhere to the strict line of consideration so laid down, and to interpret the words of the testator, and give effect to the acts of the legatee in relation to the will, in exact accordance with what the law requires.

This is a case in which it is necessary, in order to understand the subject matter of the will and the terms employed by the testator, that the surrounding circumstances should be stated. Before April 1914, when Fleming Clement Gregory went to England on a holiday, Ancell Clement Gregory was trading as a pearler at Broome and Fleming was his manager. Fleming enlisted on the outbreak of war, and Ancell admitted his brother into partnership in the business, limited to certain property of Ancell's, consisting of six specified vessels. The partnership deed is dated 27th January 1915, and was executed by Ancell in Australia and by Fleming in England. By the terms of the deed, it was provided as follows :—By clause 1 the partnership, dated as from 1st January 1915, was to continue until terminated as therein provided ; and provision was made applicable

(1) 12 Moo. P.C.C., 116, at p. 127.

H. C. OF A. 1920.

DRAKE-BROCKMAN v. GREGORY.

Isaacs J. Rich J.

to matters within the lifetime of both parties. The deed also provided what the interests of the partners should be. As to capital it declared: "The partnership property shall be divided into three shares of which the said Ancell Clement Gregory shall be entitled to two shares and the said Fleming Clement Gregory to one share." As to profits it was provided, by clause 6, that "The net profits of the business shall belong to the partners in the following proportions, that is to say, the said Ancell Clement Gregory two-thirds and the said Fleming Clement Gregory one-third." Clause 10 provided that on 31st December 1915 and on 31st December in each succeeding year accounts should be taken, and the net profits (if any) should be divided. The event of death was provided for by two clauses (15 and 16), and the provision was twofold: first, "the surviving partner may if he so desires purchase the share of the deceased in the capital and assets of the partnership" in the manner specified, and "the price to be paid shall be the value thereof as standing in the books and disclosed by a balance-sheet to be drawn up for the purpose"; next, "if the surviving partner shall not exercise the option of purchasing the share and interest of the deceased . . . the partnership shall be wound up and the assets distributed as provided by the *Partnership Act* 1895 but each partner" (which, in this case, must read "the surviving partner") "shall be entitled to bid at any sale of such assets by public auction." The contract, therefore, provided that the death of a partner inevitably (in the absence of any arrangement of those interested in his estate) involved the complete severance of the estate from the business. The survivor might purchase the interest either at a valuation or by offering at public auction the highest sum as the value of the joint property of the firm. But in any case the contract itself insisted on a sale of the deceased partner's interest. And a "sale" involves that the thing sold becomes thereby the property of the purchaser, and the price becomes the property—the new property—of the seller.

Now, in November 1915 Fleming, on service in England, made his will. After the clauses dealing with money due to him from the Army authorities and with insurance moneys, there comes the crucial provision, which says: "My share in the registered trading

company Gregory and Company of Broome W.A. I leave to my brother Captain A. C. Gregory of Broome W.A. on condition that he pays one-quarter of my share in the profits yearly to my mother S. Henson during her life, one-half of my share in the profits to be paid to my wife Alice during her life. This one-half to revert to my daughter Patricia on my wife's death or remarriage and in case of the death of both to revert to my brother Captain A. C. Gregory. The other one-quarter to be retained by my brother Captain A. C. Gregory." That was a direct gift to his brother Ancell of his (Fleming's) "share in the registered trading company," but "on condition" that Ancell undertook the obligation of paying "one-quarter of my share in the profits yearly" to the testator's mother, S. Henson, &c. The "share in the registered trading company" means the one-third share in the capital, which at the instant of Fleming's death belonged to him and passed by his will to Ancell, supposing he accepted the gift. The expression "my share in the profits yearly" obviously refers to clause 6 of the agreement—the testator's share in the profits yearly being the one-third of the net profits as ascertained by the yearly balance-sheet of 31st December to which he, while a partner, was entitled. Now, reading the whole section of the will relating to the testator's share in the business, the natural meaning is that Ancell is to take the share in the state in which it existed at the moment of the testator's death; to take it, simply by authority of the will, as a gift; to step straight into the testator's shoes with respect to it, and, being thereby entitled to the testator's share of business profits yearly as provided for under clauses 6 and 10 of the partnership deed, to undertake to distribute that share of profits yearly—which involves making them up as directed by clause 10—among the testator's mother and widow (or daughter) and himself in the stated proportions. That construction involves the retention of the share in the assets of the business exactly in the form existing at the testator's death, and involves that the return for the gift (called a condition) standing in the place of the consideration that would be given if the contract were adhered to shall be not purchase price but distribution of profits. "Purchase price" was thus entirely eliminated from the scheme. Unless the "share" is to be retained in its primary form so as to call into

H. C. OF A. 1920.

DRAKE-BROCKMAN v. GREGORY.

Isaacs J. Rich J.

operation every year clauses 6 and 10, the words in the will "my share in the profits yearly," which are on the face of them to be constantly applied, would lose their force. It must be borne in mind that inasmuch as that share of profits is a share—as clause 6 says—of "the net profits *of the business*," not of the testator's capital share in the business but of the whole capital of the business, of both Ancell's share and Fleming's share, it is wholly inapplicable to interest arising from the investment of the proceeds of Fleming's share alone. That is even apart from the substitution of quite different terminology, which would be necessary to make "interest" equivalent to "share of profits," or to to make "profits in some other business" equivalent to "my share in the profits yearly" in this particular business. The relevant section of the will contemplated Ancell continuing the same business; it did not and could not force that position on Ancell, but, judging by the words employed, the just conclusion is that the testator confidently expected it, and thought it sufficiently sure to build his arrangements upon, including his insurance moneys, which were clearly recommended to follow the fate of the business. That is one reason for holding that the share in its primary form, as it may be termed, is the true meaning of the phrase "my share in the registered trading company Gregory & Company." It need hardly be said that this reasoning involves the consequence that the gift to Ancell is so bound up with the obligation of the donee as to make the two inseparable so long as the business continues. The word "condition," though probably operating only as a trust, indicates the intention of the testator to attach the obligation to the gift to the extent that so long as the business continues and produces profits his mother and his wife or daughter shall share them, and that Ancell, taking as legatee, shall not enjoy the profits arising by reason of the legacy to a greater extent than one fourth. In other words, whether Ancell takes the gift as a gift in the primary or the secondary form, his trust obligations are to operate. The Court cannot vary the terms of a gift: *Cujus est dare ejus est disponere* (*Brooke* v. *Garrod* (1)). But there is also another and equally cogent reason for holding that the secondary form of the share, as

(1) 2 De G. & J., 62, at p. 66.

it may be called, cannot be held to pass to Ancell as legatee, or to carry with it any of the designated profit benefits to the mother or the daughter of the testator. The second reason is this:—Assume, even that no profit benefits were given to the testator's mother, widow or daughter, but that there was merely a gift of the share to Ancell, what in the events that have happened are Ancell's rights under the will with respect to that share? He was offered it as a gift. He had the right, under the partnership deed, to obtain it by way of purchase. If he chose to accept it as a gift, it would at once be his own property, and incapable of being the subject of purchase by him. If, on the other hand, he chose to decline it as a gift and acquire it by purchasing it, it would equally become his own property, and there would be nothing left to acquire by way of gift. It is a natural and legal impossibility that a man should become either purchaser or donee of what is known to be already his own property. Learned counsel urged that the purchase money was the share in secondary form and could be taken as the gift. But a man cannot both reject a gift, and, without competent retraction of his refusal, accept the gift. Insistence on the purchase in the present case connotes the definite rejection of the gift. It is final, because the declaration of option under the contract is irrevocable (*In re Blake*; *Gawthorne* v. *Blake* (1)). It does not matter with what expectation he so acted: the question really is, what did he do in fact? The rest is a matter of law (see per *Kindersley* V.C. in *Frayne* v. *Taylor* (2)). The case is entirely different from that put in argument—and supported by authorities—of a gift to A of property over which B has an option of purchase. There, if B does not exercise his option, A takes the property in its existing form; if B does exercise his option, then that circumstance does not necessarily exclude A from taking the property substituted for it. The result depends to some extent on extraneous circumstances. But the vital difference between such a case and the present is that A has there done nothing to refuse the gift, nothing inconsistent with his acceptance of the bounty offered so far as he can obtain it. If, however, A were the devisee of a house over which *he*, and not a third person, had an option of purchase, and he, nevertheless, insisted on exercising the option,

(1) (1917) 1 Ch., 18, at p. 23. (2) 33 L.J. Ch., 228, at p. 231.

H. C. OF A. 1920.

DRAKE-BROCKMAN v. GREGORY.

Isaacs J. Rich J.

that would necessarily connote rejection of the gift ; because it would be treating the property as not being his own, notwithstanding the testator's offer. Where a third person has the option—and it is the " third person " that is the important factor (see *Weeding* v. *Weeding* (1), *Frewen* v. *Frewen* (2) and *In re Kerry* (3))—the devisee accepting the gift of the property as it stands at the testator's death accepts it as it is but subject to the possible transformation that may occur at a later date, and the law regards the date of exercise of the option as the date when conversion operates (per Lord *Eldon* in *Townley* v. *Bedwell* (4) and *Chitty* J. in *In re Isaacs* ; *Isaacs* v. *Reginall* (5)). The option is not there the devisee's property ; the obligation of satisfying its conditions and parting with the consideration for it does not rest on him ; he simply stands ready to receive from the estate whatever may come to the estate in respect of the property given, and, once received, that ends the matter.

In the present case the option is his property ; but, being a right in respect of another person's property, he can only exercise it on the basis that that property remains another's ; he pays out the consideration to that other person by his representative, being under an obligation to do so, *not as representing* the property purchased, but as the price for getting direct from the estate that property in its actual state. The payment is a real payment, and not a mere futile book-keeping entry. Since, therefore, in the case supposed, the only gift mentioned in the will is ignored, there is nothing that can be pointed to in the will entitling Ancell to claim from the estate money which, by the assumption, he is in the circumstances bound to pay to the executor, and has paid to the executor, as for property which, up to the time of the exercise of the option, was still the property of the executor, in trust for the next of kin, and was not up to that time the property of Ancell at law or in equity.

The question, then, is, what attitude did Ancell in fact assume ? He was free to accept his brother's share as a gift, or to decline it as a gift with the accompanying responsibilities and to stand on his

(1) 1 John. & H., 424, at p. 430.
(2) 10 Ch. App., 610.
(3) 5 T.L.R., 178, at p. 179.
(4) 14 Ves., 590.
(5) (1894) 3 Ch., 506, at p. 509.

contractual power of purchase free from those responsibilities. In other words, did he in relation to his brother's share act as *legatee*, or as *purchaser*? His affidavit makes this quite clear. In par. 6 he refers to the provision in par. 15 of the partnership deed: "On the death of one partner the surviving partner might purchase the share of the deceased 'partner,' and the price to be paid should be the value thereof as standing in the books and disclosed by a balance-sheet to be drawn up for the purpose." Par. 7 sets out the object of the originating summons. It says: "I desire that the meaning to be attached to the last mentioned words should be determined, and when so determined that some person should be appointed to draw up the balance-sheet and *fix the price to be paid by me to the estate*." Par. 8 amounts to a declaration of election, because it says: "When the purchase price of the partnership is fixed and the other assets of the estate collected I desire to pay or transfer to some third person as trustee for the wife and daughter the *share* to which they are entitled under the will," &c. We were told during the argument that the share had been purchased and, though sixteen months had elapsed between the death and the exercise of the option, it was treated as a duly exercised option. The Supreme Court held that Ancell had "elected to purchase the share" (see par. (*b*) of the formal order). The attitude of Ancell is therefore not uncertain. He acted under clause 15 of the partnership deed in acquiring the share by purchase as if the will had never been made, and not as legatee by accepting the gift under the will. He bought and paid for the share; he did not accept it as a gift with accompanying obligations. He wishes, he says, to pay or transfer to a third person "the share" of the wife and daughter, not the "share of the profits yearly" to the mother and wife or daughter. As, therefore, he does not take as legatee but disclaims the gift, the gift falls entirely, and, with it, the incidental obligations which do not and could not exist apart from it. Ancell might just as well have chosen to act under clause 16 of the deed as under clause 15. If he had done so and a third person had purchased the whole business, how would any trust have arisen to pay income on the estate proportion of the price, to the mother, widow or daughter?

H. C. OF A. 1920.

DRAKE-BROCKMAN v. GREGORY.

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