most interesting case may ultimately be only a question of abstract speculation. If the question should ever arise in some other country as to the extent of parliamentary power to create new courts, the answer must primarily depend on the peculiar circumstances of that country's constitution. But should the constitution otherwise provide no bar, then the decision in *Minister of the Interior v Harris* may become on the one hand a check on the attempt of Governments to circumvent the courts in enacting radical legislation, or on the other hand an arbitrary and powerful instrument in the hands of reactionary courts to prevent the passage of progressive or liberal legislation.

G. KOLTS, Comment Editor—Fourth Year Student.

INVESTMENTS NOT PERMITTED BY A TRUST INSTRUMENT. RIDDLE v RIDDLE

A DECISION of great practical importance to practitioners in both branches of the profession and to students is the recent one of the High Court in *Riddle v Riddle*.[1] It marks a further step forward in the extending of the right of trustees to approach the Court in Equity to have transactions approved which do not comply with the provisions of the trust instrument.

Prior to the Trustee Act, 1925-1942 (N.S.W.),[2] the court, except in case of emergency, had no jurisdiction to approve in advance of transactions by trustees not within the terms of the trust. The principles governing the exercise of the court's emergency jurisdiction were expounded by the courts in the cases of *Re New*[3] and *Re Tollemache*.[4] Only where a strict observance of the trusts would involve loss to the *cestuis que trustent* in a situation which it can reasonably be presumed the author of the trust did not anticipate, could the court sanction a departure from the terms of the trust to prevent such loss.

By section 81 of the Trustee Act, 1925, the jurisdiction of the Court was enlarged to enable trustees to approach the court in advance to obtain its approval to transactions not allowed by the trust instrument. The most important part of this section is as follows:

> (i) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure or transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the court—
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> (a) may by order confer upon the trustees either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the court may think fit. . . .

The Court has no jurisdiction under this section unless the property in question is vested in trustees and unless the proposed transaction arises in the management or administration of that property.[5]

Until the decision in *Riddle v Riddle*[6], the principal authority on the meaning of the section, especially in relation to investments, was that of the Full Court of the Supreme Court of New South Wales in the case of *In re Strang*.[7] In that

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[1] (1952) A.L.R. 167.

[2] 1925, No. 14—1942, No. 26.

[3] (1901) 2 Ch. 534.

[4] (1903) 1 Ch. 457.

[5] *In re Craven's Estate* (1937) Ch. 431 at 436; *Degan v Lee* (1939) 39 S.R. (N.S.W.) 234 at 240; *Riddle v Riddle*, cited *supra* n. 1 at 171 and 172.

[6] Cited *supra* n. 1.

[7] (1941) 41 S.R. (N.S.W.) 114.

case the court held that for it to make an order authorising investment under the section, it must have before it evidence—(a) that it is desirable to resort to the particular type of investment either to obtain some special advantage or to avoid some special disadvantage, and (b) that the particular investment proposed is eligible of its type (unless the type is such that the choice of particular instances may safely be left to the trustee's discretion). This means that in the case of investments a special onus of proof lies upon the trustees to show that the order sought is expediently required. It also refers to the practice of the Court then obtaining, that to obtain a general order the trustees must first bring forward for approval a particular concrete proposal which, when approved, can be made the basis of the general order.

It was also decided in *In re Strang*[8] that to establish expediency the trustees cannot rely on circumstances applicable to trusts generally, but must prove circumstances special to the particular trust they administer. Another principle to be abstracted from that case is that, although the court has jurisdiction to do so, it will never be proper for it to make a general order authorising investment in companies."The question is not so much whether the court possesses jurisdiction to make such an order — the section being very wide — as whether it would be proper to exercise its jurisdiction in the way suggested. . . . I am clearly of opinion that it would not be proper for the court to make a general order authorising investment in the purchase of shares in joint stock companies to be selected at the discretion of the trustee."[9]

The order sought in *In re Strang*[10] was that the trustee be authorised (i) to invest trust moneys in the purchase of shares in any or all of twenty-two named companies; (ii) (a) to realise at its discretion any such investment and apply the proceeds in the purchase of shares in any of the other companies; and (ii) (b) to apply estate moneys in subscribing for securities in any of the companies offered in respect of any holding in such companies.

Section 14 of the Trustee Act, 1925, appears to have been a source of difficulty to the court. It considered that it ought not, by a purported exercise of its jurisdiction under s. 81, bring about, in effect, a legislative amendment of that section. As investment in the shares of joint stock companies is not authorised by s. 14, the court ought not, in effect, to amend that section by adopting a general policy to be implemented under s. 81 of making such shares authorised securities. Hence an order under s. 81 authorising investment in shares will only be made where a concrete proposal is brought forward and very special circumstances appertaining to the particular trust are shown. In other words, to conform to the legislative intention alleged to be expressed in s. 14, the court will in general turn its back on investment in shares. With respect, this seems to the writer to be the unwarranted application of some principle akin to that of *Expressio unius exclusio alterius*.

In *Re Riddle*[11] the lower court followed *In re Strang*,[12] and Roper C.J. in Eq. said: "In that case it was emphasised that the circumstances of a particular trust and the evidence addressed in favour of a particular order were the essential considerations for the court in considering whether it should exercise its discretion in favour of an application under section 81; but the general principle to be extracted from that decision is that the court should not in purported exercise of its jurisdiction under section 81 bring about the effect of a legislative amendment of section 14."

The summons in that case asked "(i) for an order authorising the trustees to postpone the conversion of and to retain certain shareholdings in companies,

[8] *Ibid.*
[9] *Id.* at 117, per Jordan C.J.
[10] *Ibid.*
[11] (1951) 68 W.N. (N.S.W.) 201 at 203, 204.
[12] Cited *supra* n. 7.

and (ii) for an order authorising them to reinvest the proceeds of the conversion of any of those shares or any other investments for the time being of the estate in shares in the capital of a number of public companies registered on the Stock Exchange and authorising them to vary and transpose any such investments from time to time."[13] The ground upon which the order was sought was "that the present inflationary trend is so great and so obvious that the trustees of this estate should as a matter of expediency be permitted to invest money available to them in shares in companies which possess tangible assets in order that the beneficiaries should not suffer the full effect of the actual depreciation in the value of money or securities. . . ."[14] His Honour granted the first order requested but refused to make the second on the principles laid down in *In re Strang*.[15]

On appeal, the High Court, by majority,[16] disapproved *In re Strang*[17] and its principles. It held that s. 81 required no higher degree of proof of expediency in the case of investments than in the case of a sale, lease, mortgage, etc. Secondly, it was not legally wrong or improper to make a general order authorising investment in shares. Thirdly, the fact that no circumstances were proved other than those affecting similar trust estates generally was no reason for refusing an order. The argument that s. 14 limited the court's jurisdiction under s. 81 was also rejected, as too was the opinion that a particular concrete investment must be brought forward to be made the basis of the general order sought.

His Honour the Chief Justice, then Dixon J., said:[18]

> But I cannot see why it should be legally wrong or in any sense improper to make an order sufficiently general to enable the trustees to act at their own discretion in selecting out of a list of shares named in the order or out of a description of shares defined in the order particular shares from time to time for investment or for sale. I respectfully disagree with the view that the fact that all other trust estates with the same lack of power are affected in the same manner takes the case outside the section or affords a reason for refusing to make an order. The section contemplates the conferring of a power of investment outside the investments allowed by s. 14 and, if it is expedient to do this for reasons applicable only to the particular estate or a limited class of estates, I am unable to see why it is less expedient because the reasons are of general application.
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> Nor am I able to assent to the view that s. 81 in its application to powers to invest is confined to cases where a specific investment is found to be expedient so that the basis of the order must be the particular investment, though the authority given by the order may be a general power.
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> When s. 81 (i) says that the courts may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose it is referring back to the various purposes mentioned earlier in the sub-section, namely any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure or transaction. A general power to enter upon any of these transactions must be a power authorising them as a description of transaction, not as a specific identifiable contemplated transaction. The expression 'any investment' is quite capable of meaning 'any description of investment', if indeed that is not its *prima facie* meaning. Any other interpretation would involve an awkward and, I think, purposeless restriction of the provision to cases where, to obtain a general power, the trustees had to produce to the court

[13] See *Riddle v Riddle*, cited *supra* n. 1 at 170.
[14] *Re Riddle*, cited supra n. 11 at 203, per Roper C.J. in Eq.
[15] Cited *supra* n. 7.
[16] (1952) A.L.R. 167.
[17] Cited *supra* n. 7.
[18] (1952) A.L.R. at 169.

an inchoate, identifiable, particular transaction. The trustees having done that the court could then, according to the express terms of the section, confer the necessary power generally as opposed to conferring it in the particular instance.

Speaking of the onus of proof required by s. 81 Williams J.[19] said: "With respect I entirely disagree with the view that the evidence must prove that it is desirable to resort to the particular type of investment to obtain some special advantage or to avoid some special disadvantage. There is no such requirement in the section. The court has only to be satisfied that it is expedient that the trustees should be authorised to make an investment or investments. The degree of proof that a proposed investment is expedient is no higher than the proof required that any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction is expedient." His Honour, discussing what was meant by "expedient" said: "The ordinary natural grammatical meaning of 'expedient' is 'advantageous', 'desirable', 'suitable to the circumstances of the case.' If the court forms the opinion that it is desirable to extend the investment powers of trustees it can extend them. . . ."[20].

"The one and only test is the expediency of the act or thing which the court is asked to authorise the trustees to do or abstain from doing. The court has only to be of opinion that the trust property as a whole will in fact benefit from the making of the order. The trust property consists of the assets in which it is invested and it must be expedient that the property should be invested in assets which, having regard to the existing and probable future economic conditions in Australia, are most likely to provide the best income for the life tenant and the best security for the capital."[21]

On this question of onus of proof and the meaning of "expediency", Kitto J., one of the dissenting judges, concurred in the views of Williams J. He said: "When the court is called upon to consider the expediency of a proposed transaction, it seems to me to be not only entitled but bound to take into consideration all circumstances which bear upon the asserted expediency, whether they affect the particular trust specially or only affect it in common with other trusts; and if there are circumstances operating in the community generally which are relevant to the question of expediency, their relevance cannot disappear because of the inability of the trustees to point to special circumstances which also are relevant. In a word, expedient must mean expedient for any reason at all."[22]

Williams J.[23] disagreed with the view that s. 81 did not enable the court to authorise types of investment not authorised by s. 14. The other majority judges, Dixon and Webb JJ., disagreed with this view also. Although Kitto J. did not express any decided opinion one way or the other, in the writer's opinion based on his Honour's comments on share investments and on what appears to be his real reason for dissenting, he can probably be taken to concur in the majority view on this matter. Williams J. said: "The view that an order extending trustees' powers of investment so as to include types of investment not authorised by s. 14 of the Trustee Act is beyond the jurisdiction of the Court under s. 81 is quite untenable. Section 14 is a law which authorises trustees to make certain investments. Section 81 is another law which says in the plainest terms that the court may extend trustees' powers of investment. In exercising its jurisdiction under the section, the court is not legislating. The court is doing the very thing that s. 81 authorises it to do. . . ."[24]

The core of Fullagar J.'s dissent seems to be in his own words, "that the

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[19] *Id.* at 173.
[20] *Ibid.*
[21] *Id.* at 174.
[22] *Id.* at 181.
[23] *Id.* at 175.
[24] *Ibid.*

section" (s. 81) "was addressed to an existing position in equity, and that no question of jurisdiction arises under it in such a case as the present. The jurisdiction of equity is the jurisdiction which the great Chancellors, and the men who made equity, assumed and in fact exercised. At all times which can be regarded as material, equity had the jurisdiction which s. 81 purports to confer. It is true that very eminent judges, when they have been asked to sanction a departure from the terms of the trust, have used language which suggests that the question whether the application should be granted was a question of jurisdiction. . . . Equity had the jurisdiction, but generally refused to exercise it if no more than 'expediency' were proved."[25].

This statement of his Honour, even if viewed merely as an academic question, seems with very great respect, to be unsound. Not only have judges in the past used language which suggests that the question was one of jurisdiction, but they have also used such language as clearly indicates that the matter was one of jurisdiction. When I say "judges in the past" I mean judges of the 19th century. It may very well be that judges of the very early beginnings of equity had unlimited jurisdiction and it might truly be said that s. 81 is directed towards jurisdiction which they exercised. Now basically the word "jurisdiction" means "power", and lack of power means lack of jurisdiction. If judges of the 19th century were more restricted in the exercise of their powers than their predecessors then they were also more lacking in jurisdiction than their predecessors, for a power which cannot be exercised under certain circumstances becomes diminished to that extent. If a judge of that era purported to deviate from the principles regulating the exercise of the emergency jurisdiction discussed in *Re New*[26] it is certain that he would be quickly corrected on the appellate level. Being thus liable to correction by appellate tribunals, it is equally certain that he possessed no power or jurisdiction so to deviate.

All the great historians who wrote on the development of the law regarded equity at the end of the 19th century as being as rigid as the common law. The equity lawyers were as much confined within the metes and bounds of case law as the common lawyers. How then can it be said that equity courts possessed a jurisdiction which they could not exercise? There are many dicta which, in the writer's opinion, lend support to his argument,[27] and there seems to be no reason why these dicta should not be given their plain, ordinary meaning. If such meaning is given they clearly show that the question at issue is one of jurisdiction and that s. 81 is not addressed to an existing jurisdiction. Hence the very thing that Fullagar J. urges us not to do should be done, that is, the jurisdiction conferred by s. 81 being a novel one, you must interpret the section liberally and "advance the remedy".

There does not appear to the writer to be any real conflict between *Re New*[28] and *Re Tollemache*.[29] The judges in the latter case all expressly approved of the principles enunciated in *Re New*.[28] The results reached in each case are in the writer's opinion explicable on the difference in facts. In fact Vaughan Williams L.J. in *Re Tollemache* said: "It is admitted that the applicant cannot succeed unless she can bring herself within *Re New*."[30]

Fullagar J. adopted the opinion expressed in *Re Strang*[31] that "the will of

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[25] *Id.* at 177.

[26] Cited *supra* n. 3.

[27] Reference should be made to the following passages: *Re New*, cited *supra* n. 3 at 544 per Romer L.J.; *Re Morrison* (1901) 1 Ch. 701 at 706, 707; *Re Tollemache*, cited *supra* n. 4 at 465, 466, per Kekewich J., whose judgment was affirmed by the Court of Appeal (1903) 1 Ch. 955 at 956.

[28] Cited *supra* n. 3.

[29] Cited *supra* n. 4.

[30] *Id.* at 956.

[31] Cited *supra* n. 7.

the Parliament of New South Wales is expressed in s. 14 of the Trustee Act," that will being that no investments outside s. 14 can be proper and that s. 81 does not allow the Court to depart from this expression of intention. In the writer's respectful view, the reasoning and decision of Williams J. on this matter are correct. Section 14 itself confers some discretion on the courts in this matter of investment. Section 14 (ii) provides—"The securities authorised by this Act shall be the following, namely, . . .

> (g) any of the stocks funds or securities for the time being authorised for the investment of cash under the control or subject to the order of the court."

This surely indicates that Parliament has not finally concluded the matter of what are proper trustee investments. "Moreover, if the reasoning were to carry sufficient conviction to the minds of the learned judges of the Supreme Court, it is not inconceivable that they might make shares of some description trustee investments under s. 14 (ii) (g) of the Trustee Act by authorising them for the investment of cash under the control or subject to the order of the court."[32] If the court can enlarge the range of trustee investments under s. 14 itself, why cannot it do so under s. 81?

The main and perhaps the only reason for Kitto J's dissent was that s. 81 did not enable the court to confer on trustees powers of investment in abstract terms. In his opinion the section only provides for the sanctioning of concrete proposals. His Honour said: "The passage which Roper C.J. in Equity cited goes on to say that if shares in companies or a group of companies are, in effect, to be added to the list of trustee securities, it should be done by the Legislature and not by a purported exercise of jurisdiction under s. 81. With this I agree, not for the reason that considerations common to trusts generally are irrelevant in deciding expediency under s. 81, but for the reasons I have stated, namely, that on its true construction s. 81 does not confer jurisdiction on the court to act the part of a legislature by giving powers in abstract terms, but relates to the sanctioning of concrete proposals only."[33] His Honour did not allow himself to be influenced by questions of policy.

His Honour adopted the meaning attributed in *In re Strang*[34] and by the judge of first instance to the words "either generally or in any particular instance." "The Court, then, must have before it, on an application with respect to investment, a specific proposal for investment upon the expediency of which it may form a judgment. . . . It may be possible for the court to be satisfied that it will be expedient to do a particular thing, within the wide descriptions contained in sub-section (i), whenever a defined situation arises; and, if the court is so satisfied, of course it may confer the necessary power for the purpose generally. But I am unable to see that this can ever be so with respect to investment. The expediency of an investment must be decided in the light of all the circumstances existing at the time it is to be made, and in my opinion it would be impossible to devise an order giving a general power of investing in shares, however carefully framed might be the terms, provisions and conditions inserted in the order, which would be free from the objection that it delegates to the trustees, to some extent at least, the function which the section commits to the court, namely, the function of deciding whether the making of a given investment is expedient."[35]

Part of the above passage seems to indicate that his Honour considered that a specific proposal was necessary for the exercise of jurisdiction in the case of the other transactions besides investments listed in the section and that only when the court considered such a proposal expedient could it make it the basis of a

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[32] Per Kitto J. in *Riddle v Riddle* (1952) A.L.R. at 180.
[33] *Id.* at 181.
[34] Cited *supra* n. 7.
[35] (1952) A.L.R. at 180-181.
[36] *Id.* at 178.

general order. A statement of Fullagar J.[36] lends weight to this inference. His Honour said: "I entirely agree with Kitto J. as to the meaning and effect of the words 'generally or in any particular case'. It can only authorise some particular investment or purchase or lease or transaction. . . ." With respect, the writer prefers the decision of Dixon J. for the reasons expressed by him. That decision seems to the writer to be the more correct one, namely, that the trustees may have a general power conferred on them under the section without the prior necessity of producing a concrete proposal so long as the court considers it expedient in the light of all the circumstances to confer the general power.

Regarding his Honour's objection that a general power of investment can never be conferred even where the concrete proposal is brought forward to found the order, this seems to the writer, with respect, to be without foundation. The section does not forbid the court to confer a general power of investment which enables the trustees themselves to decide whether it is expedient that their power should be exercised in a particular way. The word "generally" in sub-s. (i) indicates and implies that discretion may be given to the trustees. The court has only to consider whether it is expedient that the trustees should have such a discretion, and it is not impossible that it might be so expedient.

The fears of some of the judges that the giving of the very wide meaning to the section which has been given by the majority would compel the court to involve trusts in hazardous enterprises and to act contrary to the wishes of testators do not seem justified. As regards the first objection, the section itself enables the court adequately to protect the beneficiaries by the imposition of appropriate conditions. Secondly, the trustee is not, if, for example, the court authorised investment in shares, excused from his duty to act prudently, although the onus of proof is shifted on to the beneficiaries to show imprudence where it is alleged.[37] It seems to the writer that the courts should have the fullest powers to deal with problems arising in relation to trust estates so that all beneficiaries, whether interested in corpus or income, shall receive the maximum possible protection. The majority's interpretation of s. 81 has in large measure brought this about. Williams J. said:[38] "Section 81 authorises the court to step in whenever it is of opinion that sound, practical business considerations make it expedient that trustees should have administrative powers in addition to or overriding the powers derived from the trust instrument or the general law." With respect, this seems to the writer to be the correct approach.

Kitto J.[39] voiced the opinion that a construction should not be given to the section "which would give the court a general power of reforming trust instruments by adding to them, regardless of the wishes of testators and settlors, every administrative power which seems to the court to be an expedient power for the trustees to have." As to this objection, it cannot be just that testators and settlors should be able to impede unduly trustees in the management and administration of the trust property and so be the cause of losses to the estate. Substantial satisfaction will be given to the wishes of a testator or settlor where the estate is distributed among the persons and in the proportions specified, even though the method of administration is departed from.

The question of how evidence was to be adduced as to the suitability of companies for investment did not present the same difficulty to the High Court as it presented to the New South Wales Supreme Court in *In re Strang*.[40] The writer has not dealt with this question here as in his opinion the adequate discussion of all that is implied in the difference of views might well require a separate note.

C. J. NEEDS, LL.B., University of Sydney, 1952.

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[37] *Id.* at 176 and 180.

[38] *Id.* at 174

[39] *Id.* at 182.

[40] Cited *supra* n. 7, at 110-111; and see *Riddle v Riddle*, cited *supra* n. 1. 170, 175 and 182.