of comparative negligence and so was forced to leave it unformulated. It is not unlikely, as submitted above, that future cases will force hte "qualification" into the open, unless in the meantime the adoption of apportionment legislation becomes universal.

M. L. FOSTER, Case Editor—Fourth Year Student.

MINISTER OF THE INTERIOR v HARRIS and THE SOUTH AFRICAN HIGH COURT OF PARLIAMENT ACT

The decision of the Appellate Division of the Supreme Court of South Africa delivered towards the end of 1952[1] in the case of the *Minister of the Interior v Harris*[2] is of considerable interest to students of constitutional law. In that case the court unanimously held that the High Court of Parliament Act was invalid, but each of the five judges delivered a separate judgment.[3]

Notwithstanding the unanimity of the conclusions reached, there are quite marked differences in certain aspects of the reasons given by several of the members of the court. These differences are particularly crucial in the judgments of the Chief Justice, Mr. Justice van der Heever and Mr. Justice Schreiner. The Chief Justice and Mr. Justice van der Heever expressed similar views, although the latter used language capable of wider application, but Mr. Justice Schreiner went much further than his brethren and said that while he concurred with the reasons given by the Chief Justice, nevertheless he was also of the opinion that the Act before the court was invalid for quite a different reason as well.

The Chief Justice commenced by emphasising the continued validity of the so-called "entrenched clauses", sections 35, 137 and 152 of the South Africa Act.[5] He pointed out that these sections undoubtedly conferred certain rights on individuals and that those rights could not be abolished or restricted unless the procedure prescribed by section 152 itself was followed.[6] It was apparent that if these rights were to be protected then the individual must of necessity have the right to call on the judicial power to help him resist any executive or legislative action which offended against these sections.

The task of the court according to the Chief Justice was therefore to decide whether the High Court of Parliament Act infringed any of these sections. His Honour was of the opinion that Parliament had the power under the South Africa Act to create new courts, but such courts, he said, must be "courts of law" as contemplated by the South Africa Act. In his view the High Court of Parliament was not such a court as was envisaged by section 152 and the Act creating that court was therefore invalid.

He advanced three reasons for holding that the High Court was not a "court". Firstly, he said, it was not comprised of judges but of legislators sitting in judgment on themselves. Many of them had no training in the law, they delegated consideration of the case before them to a judicial committee and generally the court adopted a procedure alien to a court of law. Secondly, according to

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[1] 13th November, 1952.

[2] This note is based on the reports of the case appearing in *The Rand Daily Mail* of 14th November, 1952.

[3] The Chief Justice, Mr. Justice A. van de Sandts Centlivres, Mr. Justice L. Greenberg, Mr. Justice O. D. Schreiner, Mr. Justice F. P. van der Heever and Mr. Justice O. H. Hoexter.

[5] See *supra* p. 64 ff.

[6] For other aspects of the matter see *ibid.*

[7] The Act provided that individuals had no right to bring under review to the High Court of Parliament any decision of the Appellate Division. The only person who had that right was a Minister of State; and under Section 5 (1) (a) he was compelled to approach the Court whenever the Appellate Division declared an Act invalid.

the provisions of the Act, private individuals had no right of access to the court. And thirdly, since private individuals could not approach the court and since a decision given by the court holding an Act of Parliament to be valid was binding on all other courts in the Union, then no opportunity could ever be given to the court at a later date to reconsider or reverse an earlier decision.

While the first two reasons advanced by the Chief Justice are powerfully convincing, it seems with respect that the third proposition is of very doubtful cogency. It is only by an unreasonable stretch of the imagination that one can read into section 152 of the South Africa Act an implied intention that the courts to whom the task has been entrusted of safeguarding the rights conferred on individuals by the section must necessarily be free to depart from their own previous decisions. Although it may seem an anomaly for courts to be so fettered, yet in the light of the position of the House of Lords and the Court of Appeal in England, such a situation should, it is submitted, not be dismissed as untenable and foreign to the practice of a court of law.[8] Perhaps, however, the critical difference between the two cases lies in the fact that even if the High Court of Parliament wished to reverse its previous decision on a particular point, nevertheless it could never be given an opportunity of doing so. On the other hand the English Appellate Courts can always be approached by litigants and asked to distinguish a previous decision. In strict law, however, the reasoning of the Chief Justice could be applied to the English position to base the argument that the Court of Appeal and House of Lords are not courts.

For these reasons the Chief Justice held that the Act offended against section 152 and that a decision of the High Court such as that reversing the decision of the Appellate Division in *Harris v Minister of the Interior*[9] had the same practical effect as legislation repealing the safeguards contained in section 152 without following the procedure prescribed by that Section. The Chief Justice concluded:

> "When, therefore, one looks at the substance of the matter, the so-called High Court of Parliament is not a court of law, but is simply Parliament functioning under another name.
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> "The mere fact that Act 35 of 1952 states that the High Court of Parliament may 'on any legal ground' confirm, vary, or set aside any judgment of the Appellate Division declaring an Act invalid does not, in my opinion, carry the matter any further.
>
> "In my view Parliament cannot, by passing an Act giving itself the name of a court of law, come to any decision which will have the effect of destroying the entrenched provisions of Section 152 of the Constitution."

A slightly different analysis of the issues before the court, using rather wider language, was adopted by Mr. Justice van der Heever. While agreeing that the conclusion arrived at by the Chief Justice was "inescapable", His Honour stated the reasons which guided him to that conclusion in broader terms.

He pointed out that all the legal organs of the administration of law in the Union and the legal powers of those organs could be traced back to the South Africa Act.[10] Accordingly, since all valid laws in the Union could be traced back to the Constitution, whose substantial and procedural provisions are logically prior to any Act of the Union Parliament, then any such Act of Parliament must comply with those provisions. Carrying this analysis one step further because Parliament has only constitutionally limited and delegated power, it cannot

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[8] *London Street Tramways v London County Council* (1898) A.C. 376; and *Young v Bristol Aeroplane Co.* (1944) 60 T.L.R. 536.

[9] See *supra* p. 113.

[10] In Kelsenite terminology, that the South Africa Act was the basic norm of the South African legal system, and that it delimited norm-making competence to (*inter alia*) the Union Parliament subject to certain procedural requirements for its exercise. But see *supra* pp. 64 ff.

delegate to another body power which it does not itself possess. The learned judge said:

> "As ordinarily constituted . . . Parliament cannot expand its mandate by deleting the inhibitions of its powers in relation to the Cape franchise. It stands to reason that it cannot empower another to do what it cannot do itself."

His Honour emphasised that the constitution expressly withheld the power to alter the Cape franchise except to Parliament functioning in accordance with the provisions of Section 152, and came to the conclusion that the Act was only an attempt by Parliament in joint session to ignore these provisions and was therefore invalid:

> "If nevertheless Parliament as ordinarily constituted assumes the power to alter the Cape franchise, its Act would have no greater validity than if the City Council of Bloemfontein had presumed to do so."

Mr. Justice Greenberg and Mr. Justice Hoexter in their judgments do not appear to have carried the arguments any further than the Chief Justice, but Mr. Justice Schreiner in his analysis of the High Court of Parliament expresses some doubts in the application of the principles by the rest of the court. He was of the opinion that it was "not easy to draw a clear line of demarcation between tribunals which are and those which are not courts of law," yet he concluded that the High Court was clearly not such a court, but was "merely Parliament wearing some of the trappings of a court".

But His Honour considered that even if a court were a court of law both in procedure and in composition, nevertheless it might still be invalidly constituted if it disturbed the judicial system. There appears to be some ambiguity in the use of the words "disturbance of the judicial system". Clearly the creation of any new court with either concurrent or appellate jurisdiction over the same heads as the existing courts must alter and thereby "disturb" the existing legal framework of the administration of law. This disturbance could be either of a greater or of a lesser degree. An amendment of the judicial hierarchy which, for instance, created a new Superior Court of Appeal would be of the latter type and could hardly be attacked on this ground. However, a grant of judicial power to an inferior court to hear appeals from what was hitherto a superior court could obviously be open to attack. The learned judge went on to exemplify his view:

> "If for example an Act were passed bicamerally giving the magistrate's court of any named South African town jurisdiction to hear, without further appeal, appeals from the Appellate Division of the Supreme Court in matters involving the validity or invalidity of Acts of Parliament, it would be difficult to deny to such a magistrate's court the name of court of law, assuming that it preserved the normal features of magistrates' courts.
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> "Nevertheless it might very well be—I need put it no higher—that the Act in question would be held to be invalid because it would involve a radical[11] departure from the judicial hierarchy set up in the Constitution and a grave impairment of the protective system implicit in Section 152.
>
> "An entirely sufficient and convincing reason in my view for holding that the High Court of Parliament Act is invalid in altering Section 152 without being passed in accordance with the second proviso to that Section is that it interferes with or departs from the protective judicial system implicit in Section 152."

This is clearly a view that merits consideration and is not referred to by any of the other judges.[12] It may offer a valuable precedent to be applied in a legal system where Parliament's power is not similarly otherwise inhibited as is the Union Parliament. However, in general the comparative significance of this

[11] The word "radical" seems crucial.

[12] On the material available to the writer.

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—
>
> (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.