Is the decision therefore incorrect? There can be no doubt that Mr. Ormrod was indeed an agent in the generic sense in that he was acting on behalf of the owner. But, as the law now stands, that alone is insufficient to render his principal liable for his negligence. An independent contractor is an agent, but his principal is not, in general, liable for his torts. Before one person will be liable for the acts of his agent in this sense it must first be established that the agent is subject to the right of control of his principal, in which case he would be a servant. Was then Mr. Ormrod, in fact, the servant of the owner?

A servant is one employed to do work for another on terms that he is to be subject to the right of control of his principal in the manner in which the work is to be done. It is clear that in driving the car to Monte Carlo Mr. Ormrod was doing the work for the owner. There was but one other requisite necessary to constitute the relationship of master and servant, that Mr. Ormrod was to be subject to the right of control of the owner in the manner in which he drove. Now, since the driving was an act done in the main for the benefit of the owner, there would be a presumption that the owner retained the right to control. Only one further point arises. Was this presumption rebutted by the terms of arrangement? In agreeing that the friend should drive in his own time and manner, did the owner abandon his right to control?

In a strict or narrow sense it could be said that the owner of a car could never abandon the right to control the manner in which it is to be driven, other than by contract. However, in *Samson* v. *Aitchison*[39] the Privy Council referred to an implied abandonment of the right in the form of a bailment. It is submitted, therefore, that there could be abandonment of the right by express agreement, though not amounting to a binding contract, to do so.

It would appear, therefore, that the terms of the arrangement between Mr. Ormrod and the owner of the car were such that the owner had abandoned his right to control the manner in which Mr. Ormrod drove the car. Mr. Ormrod was not then a servant, and this conclusion seems strengthened by the finding of Devlin, J. Indeed, he appears to have been more in the nature of an independent contractor, who, in consideration of being allowed the use of the car for certain purposes of his own and of being taken on a touring holiday in the car, was to deliver the car to the owner at Monte Carlo. That is, he undertook merely to produce a desired result, the delivery of the car at Monte Carlo. It is therefore submitted that the decision is unlikely to stand the test of final review.

B. E. HILL, Comment Editor—Third Year Student.

PUBLIC TRUSTEE AND SURRENDER OF LEASES— *ANDREWS* v. *HOGAN*

The case of *Andrews* v. *Hogan*[1] raises once again the vexed question of the status of the Public Trustee under section 61 of the Wills, Probate and Administration Act, 1898 (N.S.W.)[2] during the period between the death of a person and the grant of probate or letters of administration in respect of his estate. However, as is sometimes the position with judicial determinations of obvious importance, it is somewhat difficult to ascertain what the case actually decides.

Briefly, the material facts of the case were as follows: At the time of her death Mrs. D. was weekly tenant of a certain residential building. For some

39 (1912) A.C. 844.

1 (1952) 86 C.L.R. 223.

2 Act No. 13, 1898 — Act No. 41, 1947; the section provides that "from and after the decease of a person dying testate or intestate, and until probate or administration . . . is granted in respect of his estate, the real and personal estate of such deceased person shall be deemed to be vested in the Public Trustee in the same manner and to the same extent as aforetime the personal estate and effects vested in the Ordinary in England".

years prior to her death she had carried on the business of subletting portions of the building, she and her two sons occupying one such portion. After her death her two sons continued to occupy this portion and three sub-tenants, H. T, and W, occupied the remaining portions as weekly sub-tenants. Some months later the landlord A served a notice to quit under the Landlord and Tenant (Amendment) Act, 1948-49 (N.S.W.)[3] upon the Public Trustee as the person in whom Mrs. D.'s estate had vested pursuant to s. 61 of the Wills, Probate and Administration Act. The Public Trustee thereupon indicated by letter that he wished to assert no interest in the premises and that he did not consider himself a proper party to any contemplated litigious proceedings.

After the expiry of the notice to quit a summons in ejectment was served on Mrs. D.'s two sons, who thereupon vacated the premises, leaving the defendants H, T and W in possession of their respective portions. A further summons in ejectment was later issued out of the Supreme Court of N.S.W. against the defendants who, in their defence, claimed the protection of the Landlord and Tenant (Amendment) Act. The landlord then applied for summary judgment on the ground that the defendants had no real defence to their action. The Supreme Court dismissed this application on the ground that the lessee had surrendered the lease and consequently, by virtue of s. 82 (1) of the Landlord and Tenant (Amendment) Act, the sub-tenants had become lessees of the head lessor and hence could be evicted by proceedings under Part III of that Act. In so holding the Court admittedly attributed an extended significance to the term "surrender" as used in the section.

On appeal to the High Court of Australia, this decision was affirmed. The individual justices, however, arrived at this conclusion along divergent lines, only one, Fullagar, J., approximating to the Supreme Court in his reasoning. This divergence of reasoning adds to the difficulty of determining the extent to which this case is to be treated as authority for some of the propositions cited in it.

The appellants' argument was developed in the following steps: (a) service of the notice to quit upon the Public Trustee was valid service; consequently (b) at the expiration of the period specified in the notice the tenancy, by virtue of s. 67 of the Landlord and Tenant (Amendment) Act, was terminated and with it the sub-tenancies of H, T and W; hence (c) H, T and W were no longer protected by the provisions of the Landlord and Tenant (Amendment) Act and were amenable to eviction by means of a Supreme Court writ in ejectment.

Dixon, C.J., considered that the first two steps were sound, but rejected the third on the ground that s. 62 (1)[4] of the Landlord and Tenant (Amendment) Act effectively precluded the landlord from bringing an ejectment action in the Supreme Court. The words "to recover possession of the premises from the lessee or for the ejectment of the lessee thereupon", he said, "should be given the widest meaning of which they are capable. They are obviously directed at all forms of proceedings for obtaining the possession which belongs to or is attributable to the lessee".[5] Accordingly he held that the words of that provision should be interpreted as extending to a proceeding by writ of ejectment where, although the lessee is not named, the direction of the writ to persons by description is sufficient to include him and he may defend the action and where a judgment for the claimant would terminate his possession by the sub-tenants who are defendants[6].

The reasoning of Webb, McTiernan and Kitto, JJ., is substantially similar, with the exception that Kitto, J., expressly refrained from deciding as to the validity of the second step, holding that the appeal could be dismissed solely on

[3] Act No. 96, 1948 — Act No. 21, 1949.

[4] The section (as far as material) reads: "Except as provided by this Part, the lessor of any prescribed premises shall not . . . take or continue any proceedings to recover possession of the premises from the lessee or for the ejectment of the lessee therefrom."

[5] (1952) 86 C.L.R. at 233. [6] *Id.* at 234.

the ground that s. 62 (1) barred ejectment proceedings in the Supreme Court.

Fullagar, J., adopted a different approach. He conceded the validity of the first two steps of the appellants' argument, but, unlike his brethren, did not consider that the provisions of s. 62 (1) of the Landlord and Tenant (Amendment) Act disposed of the case. In his opinion, the Public Trustee, who was lessee by virtue of s. 61 of the Wills, Probate and Administration Act, ceased to be in possession of the premises when Mrs. D.'s two sons vacated them; the possession of the under-lessees H, T and W was not the possession of the Public Trustee, and consequently s. 62 (1) did not prevent proceedings for ejectment in the Supreme Court. However, on the facts he held that the Public Trustee had "surrendered" the "statutory" tenancy remaining vested in him after the expiration of the notice to quit, and accordingly s. 82 (1) of the Landlord and Tenant (Amendment) Act, by making the sub-tenants lessees of the head-lessor A, prevented A from proceeding against them other than in accordance with Part III of that Act.[7]

In the judgments there are many references to the status and powers of the Public Trustee under s. 61 of the Wills, Probate and Administration Act and some consideration of earlier cases which have attempted to delimit and define his position. What, however, does the case really decide? It must be borne in mind that, on the reasoning of all the justices except Fullagar, J., the appeal was dismissed on the grounds that the sub-tenants were shielded from the Supreme Court process by s. 62 (1) of the Landlord and Tenant (Amendment) Act. The sub-tenants were holding possession on behalf of the lessee and the ejectment proceedings against them were therefore "proceedings to recover possession of the premises from the lessee", and so were barred. The Public Trustee was involved only because the late Mrs. D.'s lease had become vested in him and he was therefore the lessee protected by the section. The real point is that the Public Trustee was held to be constructively in possession of the premises through the sub-tenants of the late Mrs. D., and consequently to evict them would be to recover possession from him. As Dixon, C.J., said[8], "the special position of the Public Trustee could not affect this result". Whether the Public Trustee was a "mere formal repository" of the lease or whether he had active rights, powers, and duties in respect of it, did not matter; the significant point was that he was the "lessee" for the purposes of s. 62 (1).

Leaving aside temporarily Fullagar, J.'s, divergent solution of the case, it would appear that on the reasoning of the other justices as outlined above, it was strictly unnecessary to make any express decision as regards the propriety and effect of the service of a notice to quit on the Public Trustee. All, however, held that the Public Trustee was the proper recipient of the notice to quit. In so holding Their Honours relied upon *Smith* v. *Mather*[9], *Fred Long & Co. Ltd.* v. *Burgess*[10] and *Moodie* v. *Hosegood*[11]. While submitting that this determination does not form part of the *ratio decidendi* of the present case, it is respectfully agreed that it is a correct statement of the law. Their Honours also held, with the exception of Kitto, J. (who expressly refrained from deciding this point), that the notice to quit had the effect of terminating the tenancy under s. 67 of the Landlord and Tenant (Amendment) Act. It is significant that Their Honours did not refer to nor dissent from Herron, J.'s analysis of the question of service upon the Public Trustee in *Triggs* v. *Byron & Hales*, when His Honour, referring to *Smith* v. *Mather*[12], said that case was[13] "an authority that,

[7] Fullagar, J.'s interpretation of s. 82 (1) is an elaboration of the view adopted by the Supreme Court. He holds, in effect, that if the section is to have any function at all it must be construed as applying to the surrender of "statutory" tenancies rather than "contractual" tenancies.

[8] (1952) 86 C.L.R. at 233.

[9] (1948) 1 All E.R. 704.

[10] (1950) 1 K.B. 115.

[11] (1952) A.C. 61.

[12] (1948) 1 All E.R. 704.

[13] (1950) 67 W.N. (N.S.W.) 183, 186.

in order to bring a tenancy to an end, a landlord may serve a notice to quit upon the Public Trustee and at the expiration of that notice to quit the tenancy is at an end", and that it was "not . . . authority for any wider proposition"; the case was "consistent with the historical view of the Public Trustee's position on this basis: a landlord has a right in certain events to bring a tenancy to an end. He may do this by serving notice to quit. . . . This is a right in the landlord and not in the Public Trustee".

To sum up so far, it is submitted that on the reasoning of all but one justice in the present case it was not necessary to decide anything as to the status and capacity of the Public Trustee under s. 61 of the Wills, Probate and Administration Act; but opinions expressed as to the validity of service of notice to quit upon him should be regarded as good law.

On the reasoning of Fullagar, J., however, the question of the Public Trustee's capacity becomes of paramount importance. As s. 62 (1) of the Landlord and Tenant (Amendment) Act did not protect the sub-tenants, their only shield was s. 82 (1) which applied only where the lessee had surrendered his lease. Fullagar, J., held that, on the facts, the Public Trustee must be taken to have surrendered the lease vesting in him after Mrs. D.'s death. Other justices differed in their interpretation of the facts, but the important point is that Fullagar, J., considered that the Public Trustee had the capacity to surrender the lease. In so holding, His Honour was at variance with a number of earlier cases which had held that the Public Trustee had no active powers in connection with the estate of a deceased person vesting in him between death and grant of representation.

In particular, His Honour disagreed with the decision of Herron, J., in *Triggs* v. *Byron & Hales*[14], where it was held that the Public Trustee had no power under s. 61 of the Wills, Probate and Administration Act to surrender a lease. Fullagar, J., said[15], in connection with Herron, J.,'s opinion,

> I can only say that I am, with respect, unable to see any reason for denying to the Public Trustee the legal capacity to surrender a lease vested in him. I am well able to understand that he would be most unwilling to do any positive act which would amount to a surrender, or to do anything which might affect the rights of persons really interested in an estate vested in him. It is very unlikely that, without some very special reason, he would do any such thing. In the normal case his position is only temporary and provisional. But his position, while it subsists, is the position of a legal owner, and I can see no reason for saying that, while occupying that position, he is devoid of legal capacity. In *Triggs* v. *Byron* it seems clear enough that the Public Trustee did nothing which could be construed as amounting to a surrender, so that the question of capacity did not really matter.

With the greatest respect it must be urged that it is impossible to dispose so easily of *Triggs* v. *Byron*[16] and the rest of the closely-reasoned and self-consistent body of judicial decisions in N.S.W. on s. 61 of the Wills, Probate and Administration Act. While it is true that *Triggs* v. *Byron*[17] might have been decided on the basis that nothing had occurred which could amount to a surrender, the fact remains that the whole of Herron, J.'s carefully reasoned judgment was directed to the question of the Public Trustee's capacity to surrender a lease. In this, as in other N.S.W. cases on the section, judicial attention was focussed on the phrase "vested in the Public Trustee in the same manner and to the same extent as aforetimes the personal estate and effects vested in the Ordinary in England".

Logically, the construction of the section calls for an investigation of the

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[14] (1950) 67 W.N. (N.S.W.) 183.
[15] (1952) 86 C.L.R. at 251.
[16] (1950) 67 W.N. (N.S.W.) 183.
[17] *Supra.*

historical position of the Ordinary, and this is precisely the reasoning process adopted in the earlier cases. Without attempting here to recapitulate the steps of this historical analysis, which is probably best exemplified in the comprehensive judgment of Street, C.J., in *ex p. The Public Trustee, re Birch & Anor.*[18] where authority as early as *Hensloe's Case*[19] and *Dyke* v. *Walford*[20] are relied upon, suffice it to say that the historical investigation of the Ordinary's status has led to a number of decisions to the effect that in the words of Simpson, C.J. in Eq., in *Re Broughton*[21], the Public Trustee is "a mere formal repository of the legal estate" until such time as representation is granted. Thus, in *Foy* v. *Public Trustee*[22] it was held that the Public Trustee was not a proper party to be joined in litigious proceedings; in *Birch's Case*[23] that he could not be an "owner" for the purposes of s. 5 of the Landlord and Tenant (War Services) Act 1949[24]; and in *Triggs* v. *Byron*[25] that he could not surrender a lease vested in him.

It would appear that logically the only ground for disapproval of these cases would be that some error had been made in the historical analysis of the position of the Ordinary. This point, however, was not taken in the present case. Instead, the earlier cases were summarily dismissed by Fullagar, J., as appears from the passage cited above. Fullagar, J., placed reliance upon *Fred Long & Son Ltd.* v. *Burgess*[26] in which Bucknill, L.J., said[27], "on principle, and historically, the vesting of the estate in the President is a positive act with some legal substance". However, this case merely concerned the validity and effect of service of notice to quit upon the President of the Probate, Divorce and Admiralty Division and is distinguishable in the same manner as Herron, J., distinguished *Smith* v. *Mather*[28]. As against this, there is the opinion of Lord Davey in *Chan Kit San* v. *Ho Fung Hang*[29] that "the (equivalent) sections seem to place the registrar pending the grant of letters of administration in the position of a receiver, and to give him the power incident to such an office but nothing more".

In short, it is respectfully submitted that Fullagar, J., may well have been in error in holding that s. 61 of the Wills, Probate and Administration Act empowers the Public Trustee to surrender a lease vested in him under that section. Moreover, as the rest of the Court decided the present case on the basis of a liberal interpretation of s. 62 (1) of the Landlord and Tenant (Amendment) Act, it does not appear that Fullagar, J.'s holding as to the capacity of the Public Trustee is within the ambit of the *ratio decidendi* of the case and consequently inferior courts will be free to differ from him.

A further important question which receives some consideration in the present case is the propriety of making the Public Trustee a party to legal proceedings. *Foy* v. *The Public Trustee*[30] is authority for the proposition that the Public Trustee cannot be made a litigant merely because estate property is vested in him pursuant to s. 61 of the Wills, Probate and Administration Act. However, Fullagar, J., says[31] "It could not, one would think, be correct to say that the Public Trustee was properly served with the notice to quit because he was the 'lessee' of the claimant within the meaning of the Act and to say at the same time that he was not the 'lessee' against whom proceedings under the Act must be taken and to whom the protection of the Act was accorded". Also McTiernan, J., says[32] "the Public Trustee was no less competent to be served

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18 (1951) 51 S.R. (N.S.W.) 345 (F.C.).
19 (1600) 9 Co. Rep. 36b.
20 (1848) 5 Moo. P.C. 434.
21 (1902) 19 W.N. (N.S.W.) 69, 70.
22 (1942) 42 S.R. (N.S.W.) 209.
23 (1951) 51 S.R. (N.S.W.) 345.
24 Act No. 22, 1949.
25 (1950) 67 W.N. (N.S.W.) 183.
26 (1950) 1 K.B. 115.
27 *Id.* at 119.
28 (1948) 1 All E.R. 704.
29 (1902) A.C. 257, 261.
30 (1942) 42 S.R. (N.S.W.) 209.
31 (1952) 86 C.L.R. at 246.
32 *Id.* at 240.

with a statutory notice to quit in pursuance of the Act than with the process which the Act requires the lessor to serve upon a lessee in order to bring proceedings for the recovery of possession". Neither of Their Honours considers *Foy's Case*[33] in connection with these statements, although, in another passage[34], McTiernan, J., indicates that he does not wish to throw doubt upon that judgment.

As the propriety of service of court process upon the Public Trustee was not in issue in the present case, the statements cited above must be regarded as *obiter* and hence are not potent to override the decision in *Foy's Case*[35]. The antinomy adverted to by Fullagar, J., does in fact exist: The line of cases commencing with *Smith* v. *Mather*[36] constitutes authority for the proposition that the Public Trustee may validly be served with a notice to quit, while *Foy's Case*[37] indicates that no summons can be served on him in pursuance of it. This position is rationalised by Herron, J., in the passage already cited from *Triggs* v. *Byron*[38].

Thus, it is submitted that *Andrews* v. *Hogan*[39], despite the indications of a changed judicial attitude contained in it, has left the law in the same unsatisfactory condition as previously. After the death of a tenant, but before the grant of representation in his estate, a landlord may serve notice to quit upon the Public Trustee, but cannot bring the "lessee" before the Court. The landlord is, of course, not entirely without remedies should the grant of representation be unduly delayed or never applied for: as indicated in *Birch's Case*[40], he may apply in proper circumstances for a limited grant of administration *ad litem* or, as was suggested in *Sydney Municipal Council* v. *Hayek*[41], a vesting order may be made vesting the lease in some person for the purpose of litigation. But these procedures are expensive and unduly irksome for the landlord.

In general terms, the judicial opinions expressed in the present case and considered above probably represent an attempt to bring the law into line with current needs. Two factors would appear to prevent this: firstly, the express reference in s. 61 of the Wills, Probate and Administration Act to the Ordinary necessitates an antiquarian investigation rather than a commonsense analysis of the interests in play; it is respectfully submitted that the attempt to substitute the second for the first in the present case transgresses the bounds of permissible judicial legislation; secondly, the attitude consistently maintained by the Public Trustee that, unless he has been requested to administer the estate, he cannot take any positive steps in respect of it; thus, even if Fullagar, J.'s liberal opinion of the Public Trustee's powers were accepted, the Public Trustee's inertia might do serious violence to the interests of the beneficiaries, and in any event considerable delay would probably occur.

In conclusion, it is submitted that this problem of the Landlord and Tenant Law can be solved only by legislation. The new s. 62 (4A) of the Landlord and Tenant (Amendment) Act, which provides a method of service of notice to quit by delivering it to persons in occupation of the premises of the deceased lessee and gives those persons a right to be heard in subsquent proceedings for recovery of possession, probably does not go far enough. It does not make it clear who is to be defendant in the subsequent proceedings, and until it is otherwise expressly provided, it would appear that the Public Trustee as a "lessee" is the only feasible defendant, thus raising the old problem again. Probably the difficulty could best be cured by legislation giving the Public Trustee definite power to defend actions brought against the estate before grant of representation, giving him a wide discretion whether to defend or not, and

[33] (1942) 42 S.R. (N.S.W.) 209.
[34] (1952) 86 C.L.R. at 237.
[35] (1942) 42 S.R. (N.S.W.) 209.
[36] (1948) 1 All E.R. 704.
[37] (1942) 42 S.R. (N.S.W.) 209.
[38] (1950) 67 W.N. (N.S.W.) 183.
[39] (1952) 86 C.L.R. 223.
[40] (1951) 51 S.R. (N.S.W.) 345.
[41] (1930) 48 W.N. (N.S.W.) 11.

giving him a power to delegate to persons interested the task of defending on his behalf. Such a procedure would be more expeditious than that suggested in *Birch's Case*[42] and *Hayek's Case*[43], but of course would involve, as an attendant evil, the advent of yet another administrative department.

M. FOSTER, LL.B. (*University of Sydney, 1952*)

POWER TO VARY A TRUST: *IN RE DOWNSHIRE SETTLED ESTATES*

Following upon the important decision of the High Court of Australia in *Riddle* v. *Riddle*[1] as to the meaning of s. 81 of the Trustee Act, 1925 (N.S.W.)[2], the Court of Appeal in England has recently considered the meaning of s. 57 of the Trustee Act, 1925[3] (Eng.), which is in similar terms to s. 81[4]. The Court actually dealt with three appeals the facts of which are complex and will not be set down here. The importance of the decision may be gathered from the words of Denning, L.J., who delivered the dissenting judgment, the majority of the Court consisting of Evershed, M.R., and Romer, L.J. His Lordship said: "... the rejection of the schemes in the present cases has taken Lincoln's Inn by surprise, so much so that many proposed schemes have been held up pending our decision"[5]. The Master of the Rolls delivered a lengthy judgment on behalf of the majority and it will not therefore be possible in this case-note to consider the dissenting judgment.

The Court of Appeal "for the first time for half-a-century", to use the words of Evershed, M.R.[6], reviewed the inherent jurisdiction of the Court in relation to trusts and practitioners and students will find this review very useful.

At the outset his Lordship pointed out that the consideration of the questions raised by the appeals involved the consideration of whether the Court had the jurisdiction to make the order sought; not whether, assuming the jurisdiction exists, the Court should exercise its discretion in favour of the Appellants. He also made two general observations. His Lordship firstly observed that the Court, in the present case, did not propose to depart from the well-established practice of the Court of not attempting precise definitions of its powers in relation to its peculiar or "extra-ordinary" jurisdiction including the "inherent jurisdiction" invoked in the present case, and thereby running the risk of imposing undue fetters upon their future application. His Lordship's second observation is rather interesting in the light of the comments of Viscount Simon in *Latilla* v. *Commissioners of Inland Revenue*[7]. He said[8] that it is not an objection to the sanction by the Court of any proposed scheme in regard to trust property that its object or effect is or may be to reduce liability for tax (including death duties).

Counsel for the Appellants argued that the jurisdiction of the Court to modify or vary trusts and to direct the trustees accordingly was unlimited provided: (i) that all persons interested who were *sui juris* assented, and (ii) that it was clearly shown to be for the advantage or convenience of all persons interested who were not *sui juris*, including persons unborn or not presently ascertainable; in other words, that the Court has unlimited jurisdiction in relation to the property of infants, including the beneficial interests of infants and unborn *cestuis que trustent* under a settlement, and will exercise jurisdiction

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[42] (1951) 51 S.R. (N.S.W.) 345.
[43] (1930) 48 W.N. (N.S.W.) 11.
[1] (1952) A.L.R. 167. See "Investments not permitted by a Trust Instrument. *Riddle* v. *Riddle*" (1953) 1 *Sydney L.R.* 116.
[2] Act No. 14, 1925—Act No. 26, 1942. [3] 15 Geo. 5, c. 19.
[4] *In re Downshire Settled Estates* (1953) 2 W.L.R. 94.
[5] (1953) 2 W.L.R. at 139.
[6] *Id.* at 98.
[7] (1943) A.C. 377, 381-384.
[8] (1953) 2 W.L.R. at 99.