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McTIERNAN J. In my opinion the agreement of sale upon which the plaintiff sued was outside the reach of s. 25 (1) of the *Prices Regulation Act* 1948 (Vict.) and was at all times a valid transaction.

Barry J. found that at the time the sale was made the lead was appropriated to overseas trade : and that finding is well established by the negotiations between the parties and the facts that in respect of the lead the approval of the Federal Government to the export of the lead had been sought prior to the sale and had been subsequently given. Indeed, the defendant repudiated the contract because the overseas market for lead weakened, and, ultimately, the plaintiff sold the lead overseas on his own account at a lesser price than the contract price.

It is evident from the terms of s. 25 (1) of the *Prices Regulation Act* which the defendant contends strikes at the agreement for sale, that some limitation referable to Victoria is necessarily implied in the terms of the sub-section. The parties here both carried on business in Victoria : the lead was in Victoria : the sale was f.o.b. Melbourne : the price was expressed in Australian pounds : the price was greater than what purported to be the " maximum price " within the meaning of the Act. Does s. 25 (1) strike at sales of goods for immediate export ? Section 2 provides as follows :—" This Act shall be administered with a view to— (*a*) the prevention of undue increases in prices and rates for goods services and land in the period of post-war re-adjustment, particularly in relation to food clothing and housing ; (*b*) the regulation so far as is necessary of prices and rates for goods services and properties which are essential to the life of the community and of goods and services in general use which are in short supply ; (*c*) the progressive removal of the control of prices and rates at the earliest possible date consistent with the welfare of the community."

It seems obvious to me that the community for whose benefit the Act was passed were the people of Victoria. Since some limitation is necessary to be placed upon the general words of s. 25 (1), I think that it is proper to imply the limitation upon the basis that the object of the Act was to control the price of goods sold for consumption in Victoria. Admittedly, this is a reasonable limitation. *Barry* J. elaborately reviewed the circumstances constituting the setting in which the Act was passed. I should like to adopt his Honour's review, and the reasons which he draws from the setting in which the Act was passed, for implying a limitation upon s. 25 (1) excluding from its operation any sale of goods for

export. The *Customs* (*Prohibited Exports*) *Regulations* and the *Banking* (*Foreign Exchange Control*) *Regulations* to which *Barry* J. refers cannot be left out of account as facts in reference to which the State Legislature devised its own scheme for regulating prices. It may be assumed that it would not have been concerned with the fixing of maximum prices for goods sold for export. The directions which are given by s. 2 as to the administration of the Act show that the Legislature was concerned only with the protection of Victorian users and consumers. The authority given by the Act to fix maximum prices and the declaration of such prices intended to have force under the Act are subject to the policy expressed in those directions. No provision in the Act gives the commissioner power to approve of a price greater than the maximum statutory price for goods sold for export. The Commonwealth Prices Regulations contained such a provision. It is surprising that the Legislature omitted to give any such power to the commissioner if the Act was meant to apply to sales for export. Read with s. 2 no declaration made under or given force by the Act should be construed to affect the price of goods sold for export. There is, therefore, no need to give the commissioner power to free sales in the course of the export trade from any declaration of maximum price depending upon the Act.

In my opinion s. 25 (1) does not apply to the sale of goods where the selling is part of or for purposes of or in the course of foreign trade. This is an implied limitation based upon a clear legal criterion. Compare *Cam & Sons Pty. Ltd.* v. *The Chief Secretary of New South Wales* (1); *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick and Coy* (2). There the distinction made was between inter-State and intra-State trade. The question whether the Act upon its true construction applies to sales made in Victoria in the course of or for purposes of inter-State trade does not arise. In my opinion, the agreement of sale upon which the plaintiff sued was not affected by s. 25 (1) or any other provision of the Act and was, therefore, not void.

The question was raised by the cross appeal whether the amount of damages awarded was insufficient. As I have the misfortune to disagree with the Chief Justice and *Taylor* J. on the primary question whether the agreement was valid, it seems unnecessary for me to pursue the question of damages. For in the view that the contract was void, no award of damages is possible. It is sufficient for me to say that the contract of sale upon which the plaintiff sued was at all times valid. I must not be taken as

(1) (1951) 84 C.L.R. 442. (2) (1952) 85 C.L.R. 467.

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dissenting from the opinion of the majority upon any of the questions which it became necessary to discuss in the view that the agreement of sale was struck by the *Prices Regulation Act*.

I should dismiss the appeal.

Appeal allowed with costs; judgment of the Supreme Court discharged; in lieu thereof judgment in the action entered for the defendant with costs, including costs of pleadings, interrogatories, discoveries and shorthand notes.

Solicitor for the appellant, *R. R. Renowden*.
Solicitors for the respondent, *Evans, Masters & Gilbert*.

R. D. B.

[HIGH COURT OF AUSTRALIA.]

ANDREWS . . . . . APPELLANT;
CLAIMANT,

AND

HOGAN AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1951, *Nov.* 15, 16. 1952, *July* 31.

Dixon C.J. McTiernan, Webb, Fullagar and Kitto JJ.

Landlord and Tenant—Lease—Sub-leases—Sub-lessees in possession—Death of head lessee—Will—Probate not taken out—Vesting of head-lessee's estate in Public Trustee—Notice to quit by head-lessor to head-lessee and sub-lessees—Service on Public Trustee—Disclaimer by Public Trustee—Effectiveness of service—Ejectment proceedings in Supreme Court—Competency—Jurisdiction of Court—"Surrender"—Statutory tenancy—Landlord and Tenant (Amendment) Act 1948-1949 (*N.S.W.*) (*No.* 25 *of* 1948—*No.* 21 *of* 1949), *ss.* 8 (2), 62, 63, 66, 67, 69, 70, 82 (1) (*a*), (*b*) (*ii*)—*Wills, Probate and Administration Act* 1898-1947 (*N.S.W.*) (*No.* 13 *of* 1898—*No.* 41 *of* 1947), *s.* 61.

For some years prior to 1949 D. had been tenant, under a tenancy from week to week, from the owner of the freehold, of a residential building and carried on a business of sub-letting portions of the building, she and her two sons occupying one portion. The rest was sub-let in three portions to H., T. and W. respectively on a sub-tenancy from week to week. On 4th April 1949, A. purchased the freehold of the premises and the contract was completed by conveyance to A. on 15th July 1949. D. died on 6th April 1949, leaving a will of which the sons were the executors and under which they were the sole beneficiaries. Probate of the will was never applied for. After D.'s death the sons continued to live in the same portion of the premises and collected the respective rents of the sub-tenants. A. refused to grant the sons a tenancy of the premises. The sons paid rent to A.'s agent, receipts being given in the name of "the estate of" D. On 19th December 1949, by virtue of s. 61 of the *Wills, Probate and Administration Act* 1898-1947 (N.S.W.), A. caused to be served on the Public Trustee of New South Wales a notice to quit on the ground specified in s. 62 (5) (m) of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.). The notice having expired on 23rd January 1950, A., two days later, demanded possession of the premises from

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the sons and on 7th February he issued a summons in ejectment against them as defendants. The summons, although served, was not proceeded with as on 14th March 1950, the sons went out of possession having directed the sub-tenants to pay their rents to A. A. refused to accept rent so tendered to him denying that any tenancy subsisted between him and the sub-tenants. In a letter the Public Trustee said that D.'s estate was not " vested " but only " deemed to be vested " in him ; that he had no interest in the premises to assert ; that the estate was " merely held " by him " during the hiatus of possession " ; that he would not be a proper party to any contemplated proceeding ; and that he had no powers to exercise and no active duties to perform in connection with the estate. A summons in ejectment was issued later by A. against H. as defendant, T. and W. subsequently being joined, by leave, as defendants. A. later issued a summons asking that the appearance and particulars of defence of the defendants be struck out and he be permitted to enter judgment forthwith upon the ground that they had no defence to the action. The Supreme Court dismissed the summons. On appeal,

Held, by *Dixon* C.J., *McTiernan*, *Fullagar* and *Kitto* JJ., that the estate of D. must be regarded as vesting in the Public Trustee so that a notice under s. 62 of the *Landlord and Tenant (Amendment) Act* 1948-1949, terminating the tenancy was effective service of a notice to quit under the Act.

Held, by *McTiernan* and *Webb* JJ., (1) that courts of petty sessions are the exclusive tribunals to determine proceedings under the *Landlord and Tenant (Amendment) Act* 1948-1949 relating to " prescribed premises " where a statutory notice to quit is relied on and an action of ejectment in the Supreme Court will not lie, and (2) that the disclaimer by the Public Trustee of authority or function did not amount to a surrender, and in the absence of the Public Trustee surrendering the tenancy A. was not entitled to bring proceedings for the recovery of the possession of the premises otherwise than in accordance with the *Landlord and Tenant (Amendment) Act* 1948-1949.

Held, by *Fullagar* J., that the Public Trustee surrendered a statutory tenancy within the meaning of s. 82 (1) of the *Landlord and Tenant (Amendment) Act* 1948-1949 and the sub-tenants could only be ejected by proceedings against them under the Act in a court of petty sessions.

Anderson v. *Bowles*, (1951) 84 C.L.R. 310, referred to.

Decision of the Supreme Court of New South Wales (Full Court) : *Andrews* v. *Hogan* (1951) 68 W.N. (N.S.W.) 252, affirmed.

APPEAL from the Supreme Court of New South Wales.

Thomas Keith Andrews, who claimed to be the registered proprietor of the land comprised in certificate of title volume 790, folio 226, upon which land is erected a pair of brick houses known as number 100 and number 102, respectively, Bondi Road, Bondi, caused a summons to be issued under rule 504 of the General Rules of the Supreme Court of New South Wales for orders in an ejectment action brought by him in the Supreme Court that the appearances

and particulars of defence filed by each of the defendants, Betty Margaret Hogan, Herbert Thomas Annabel and Walter Gordon Williams, be struck out and that he, Andrews, be at liberty to enter judgment and issue execution thereon forthwith upon the ground, *inter alia*, that the defendants had no defence to the action.

Andrews became the purchaser of the subject premises, number 102 Bondi Road, by contract dated 4th April 1949, which was completed on 15th July 1949.

The subject premises had been let in 1932 to Mrs. Mary Denahy, a widow, who resided with her two sons in part of the premises and used the other part for the business of sub-letting portions thereof to various sub-tenants. Mrs. Denahy died on 6th April 1949, before the termination of her lease, having made a will in which she appointed her two sons as her executors and made them the sole beneficiaries of her estate. The sons did not take out probate of the will.

On 19th December 1949, Andrews caused a notice to quit to be served on the Public Trustee. It was stated in the notice that it was given pursuant to s. 62 (5) (m) of the *Landlord and Tenant (Amendment) Act* 1948-1949 on the ground that Andrews reasonably required the premises for reconstruction, details of which were set out. The Public Trustee, by letter dated 18th January 1950, informed Andrew's solicitors, *inter alia*, that he was not administering the estate of Mrs. Denahy deceased ; that he had no interest in the premises to assert ; that s. 61 of the *Wills, Probate and Administration Act* 1898-1947 (N.S.W.) did not vest the estate of the deceased in him but merely declared that he was deemed to be so vested ; that on the authorities the estate was merely held during the hiatus of possession and he, the Public Trustee, was merely the repository of the estate ; that in any contemplated proceedings he would not be a proper party thereto ; and that he had no powers to exercise and no active duties to perform in connection with the estate of the deceased.

After the expiry of that notice to quit the two sons, who had, in the meantime, continued the business of sub-letting, vacated the subject premises leaving the defendants in possession of various portions thereof.

The defendants claimed to be sub-tenants under the provisions of s. 82 of the *Landlord and Tenant (Amendment) Act* 1948-1949 of the portions of the subject premises respectively occupied by them.

The Supreme Court dismissed the summons (*Andrews* v. *Hogan* (1)).

(1) (1951) 68 W.N. (N.S.W.) 252.

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From that decision Andrews appealed, by special leave, to the High Court.

Further material facts appear, and relevant statutory provisions sufficiently appear, in the judgments hereunder.

F. G. Myers K.C. (with him *P. B. Toose*), for the appellant. If a tenant dies and probate of his will is, or letters of administration are, not granted a notice to quit may validly be served on the Public Trustee under the general law. That is because the legal estate until grant is vested in him and he is in fact the lessee (*Wills, Probate and Administration Act* 1898-1947 (N.S.W.), s. 61 ; *Smith* v. *Mather* (1), *Fred Long & Son Ltd.* v. *Burgess* (2)). Under the *Landlord and Tenant (Amendment) Act* 1848-1949 a notice to quit is only required to be served on the lessee. Section 8 provides that " lessee " includes his successors in title, who is the Public Trustee, unless and until representation of the estate is granted. The notice to quit terminated the tenancy when it expired : *Landlord and Tenant (Amendment) Act* 1948-1949, s. 67. That is clearly contemplated by ss. 62 (3) and 83. *Krupa* v. *Zacabag Pty. Ltd.* (3) and *Furness* v. *Sharples* (4) are inconsistent with *Richardson* v. *Landecker* (5) and were wrongly decided. The termination of the tenancy involved the termination of the sub-leases and consequently the respondents had no right to possession thereafter. Section 62 of the *Landlord and Tenant (Amendment) Act* 1948-1949 does not prevent the claimant proceeding in ejectment against the sub-lessees because by s. 8 " lessee " only includes a sub-lessee in relation to a sub-lessor. The definition requires the existence of a contractual relationship in order to make a party a lessee in respect of another party. The Supreme Court was in error in holding that s. 82 applied to anything other than a surrender properly so called. It did not in any case indicate what act constituted the surrender or who made it, and it is not possible on the facts for any person to have surrendered no matter what meaning may be given to the word. The decision in this respect is in direct conflict with the decision of the same Court in *Furness* v. *Sharples* (4).

F. R. McGrath, for the respondents. The Public Trustee was not a proper person to be served with a notice the intention of which was to extinguish an interest in the estate. He did not have any active powers, failing election or appointment, to protect the estate.

(1) (1948) 2 K.B. 212.
(2) (1950) 1 K.B. 115.
(3) (1950) 50 S.R. (N.S.W.) 304 ; 67 W.N. 221.
(4) (1950) 51 S.R. (N.S.W.) 13 ; 68 W.N. 18.
(5) (1950) 50 S.R. (N.S.W.) 250 ; 67 W.N. 149.

A notice to quit cannot validly be served on the Public Trustee (*Foy* v. *Public Trustee* (1)). In that case the decision in *Sydney Municipal Council* v. *Hayek* (2) was disapproved. It was held in *Triggs* v. *Byron* (3) that the Public Trustee cannot surrender a lease or tenancy, either expressly or by mere inaction. Inaction on the part of the Public Trustee does not involve vacation of the premises, or delivery up pursuant to the notice to quit. Possession not having been delivered up the action must, by the combined effect of s. 62 (1) and s. 69 (1) of the *Landlord and Tenant (Amendment) Act* 1948-1949, be brought in a court of petty sessions. In such a case the Supreme Court is not a competent court. Termination of tenancy did not operate to evict the Public Trustee who remained on the basis of a statutory tenancy (*Richardson* v. *Landecker* (4)). The sub-lessees cannot be evicted in ejectment: s. 82 (2). Service of a notice to quit does not terminate a tenancy (*Krupa* v. *Zacabag Pty. Ltd.* (5), *Furness* v. *Sharples* (6)). On that point *Triggs* v. *Byron* (3) and *Richardson* v. *Landecker* (4) were wrongly decided. Even if the notice to quit determined the contractual tenancy a statutory tenancy arose in the Public Trustee which he was bound to defend unless abandoned by the beneficiaries. Action must be taken at a court of petty sessions to end that kind of occupancy by dispossession, and at the hearing sub-lessees can be heard pursuant to s. 82 (4).

F. G. Myers K.C., in reply.

Cur. adv. vult.

July 31, 1952.

The following written judgments were delivered :—

DIXON C.J. This is an appeal by special leave from an order of the Full Court of the Supreme Court of New South Wales dismissing a summons of a claimant in ejectment to strike out the appearances of the defendants and their particulars of defence and to enter judgment for the claimant.

The summons had been referred from Chambers to the Full Court. The writ which was issued on 2nd June 1950 was directed in the first instance to the defendant Betty Margaret Hogan and all persons entitled to defend the possession of premises situate and known as 102 Bondi Road, Bondi, to the possession whereof

(1) (1942) 42 S.R. (N.S.W.) 209 ; 59 W.N. 142.
(2) (1930) 48 W.N. (N.S.W.) 11.
(3) (1950) 67 W.N. (N.S.W.) 183.
(4) (1950) 50 S.R. (N.S.W.) 250 ; 67 W.N. 149.
(5) (1950) 50 S.R. (N.S.W.) 304 ; 67 W.N. 221.
(6) (1950) 51 S.R. (N.S.W.) 13 ; 68 W.N. 18.

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the claimant claimed to have been on and since 24th January 1949 entitled. The premises in question are occupied in separate flats or apartments. Mrs. Hogan occupies a front upstairs room and balcony. The defendant Herbert Thomas Annabel occupies a bed sitting room and kitchenette upstairs and a sleep-out in the back yard. The defendant Walter Gordon Williams occupies two rooms on the ground floor. These two defendants were not mentioned in the writ by name but they obtained leave to enter appearances and defend the action as persons in possession of part of the premises. The premises include another flat or flats and, although it does not distinctly appear, it should I think be taken that the claimant had entered upon this part of the premises so that possession of it is to be attributed to him.

The circumstances governing the rights of the parties in relation to the premises are these. For many years Mary Denahy, a widow, had held the entire premises as the immediate tenant of the owner in fee simple. She had a tenancy from week to week. She and her two sons lived in one flat and she sub-let the other three flats upon tenancies from week to week. The three defendants had occupied their respective flats for some years as her sub-tenants. The defendant Annabel went into the sleep-out, however, later.

On 4th April 1949 the owner in fee simple entered into a contract of sale with the claimant by which the former sold the premises to the latter subject to existing tenancies and occupancies if any.

On 6th April 1949, Mrs. Denahy died. She left a will under which her two sons were her executors and sole legatees and devisees. They had not obtained probate at the time of these proceedings. The three defendants, however, paid the two sons the weekly rent in respect of their tenancies of the respective flats up to 20th March 1950.

Before Mrs. Denahy's death the defendant Annabel had asked that he might become a tenant also of the detached sleep-out in the yard, his rent being increased by six shillings a week. Mrs. Denahy had agreed but he did not go into the sleep-out until some time after her death. The defendant Annabel is a discharged serviceman who is a " protected person " within the *Landlord and Tenant (War Service) Amendment Act* 1949 (N.S.W.).

On 15th July 1949, the claimant's contract of purchase was completed and he became the owner in fee simple of the premises.

From the death of Mrs. Denahy her sons paid the weekly rent for the premises to the agents of the claimant, who gave them receipts in which the payment was stated to be made by the estate of the late Mrs. Denahy. On 19th December 1949, the claimant

served a notice to quit the premises upon the Public Trustee, describing that official as the representative of the estate of the late Mary Denahy. The notice to quit required him to deliver up the premises which, it stated, he held as tenant from week to week, on 23rd January 1950. The notice was expressed to be given pursuant to s. 62 (5) (m) of the *Landlord and Tenant (Amendment) Act* 1948-1949, on the ground that the claimant reasonably required the premises for reconstruction in certain specified respects. Apparently payment of rent for any week after the expiration of the notice to quit was refused by the claimant. The Public Trustee responded to the notice to quit by sending to the claimant's solicitors a letter in a stock form. It informed them that the Public Trustee was not administering the estate of Mary Denahy, and stated his contentions to be that he had no interest in the premises to assert, that s. 61 of the *Wills, Probate and Administration Act* 1898-1947 (N.S.W.) did not vest the estate in him but merely declared that it should be deemed to be vested, that it was merely held during " the hiatus of possession ", that he was " merely the repository of the estate ", that he would not be a proper party in any contemplated proceedings and that he had no powers to exercise and no active duties to perform in connection with the estate. This letter was written on 18th January 1950, before the expiration of the notice to quit. After the expiration of the notice, namely on 25th January 1950, the claimant's solicitors notified the two sons of the deceased tenant, that " the tenancy of the estate of the late Mary Denahy " of the premises had been terminated by notice to quit served on the Public Trustee and that the claimant revoked their " licence to remain in possession ". On 7th February 1950, the claimant issued a writ in ejectment naming the two sons as defendants. They did not defend the action, but sold the furniture of the flat they occupied and on 14th March 1950, vacated it, abandoning all further connection with the premises. The claimant took no further steps in that action of ejectment. The defendants in the present action of ejectment had paid the two sons of their late landlady rent in advance up to 20th March 1950, for their respective flats. They applied to the claimant to continue as his tenants, but to this he would not agree and tenders of rent on their part were refused. Finally the writ in this action was issued.

The case for the claimant, the appellant in this Court, can be put very simply. He says that by virtue of s. 61 of the *Wills, Probate and Administration Act* 1898-1947 the tenancy of Mary Denahy deceased must be deemed to have vested in the Public Trustee, that he served upon the latter a notice to quit authorized by

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s. 62 (5) (m) of the *Landlord and Tenant (Amendment) Act* 1948-1949, and that, according to s. 67 of that Act, the notice operated so as to determine the tenancy. Accordingly the weekly tenancy, subject to which the claimant took the fee simple, was gone and with it the sub-tenancies of the defendants. He is not, he says, by bringing his action of ejectment against the defendants, offending against the prohibition contained in s. 62 (1) of the Act, which provides that a lessor " shall not . . . take or continue any proceedings to recover possession of the premises from the lessee or for the ejectment of the lessee therefrom ". He is not so offending because, says the claimant, the proceedings are to recover possession from the defendants, lately sub-lessees, not from the lessee Mrs. Denahy, who is dead, or from the Public Trustee, who is not in possession, or from the executors and beneficiaries of her unproved will, who are not in possession and who in any case never brought themselves within the description of " lessees ". It follows that there is nothing to exclude the jurisdiction of the Supreme Court and no ground upon which the defendants can invoke the *Landlord and Tenant (Amendment) Act* 1948-1949 to protect them.

The defendants deny the validity of the steps in this argument but they also point to s. 82 (1) (a) and (b) (ii) as a provision applicable to their case which does give them protection. The material part of this provision says that where a lessee has sub-let any prescribed premises or any part thereof in the course of a business of sub-letting carried on by the lessee (and it was in the course of such a business that Mrs. Denahy sub-let to the defendants) and the lessee has ceased to be in possession of the premises following upon the surrender of the lease by the lessee, the sub-lessee shall (if he is in possession of the whole or portion of the prescribed premises sub-let to him) be deemed to have become the lessee thereof from the lessor. The sub-section, which contains much more than has been set out, is very difficult to understand. For after all under the general law a surrender of a head lease does not destroy a sub-lease, and the sub-lessee is in such an event placed in privity with the head lessor (*Wilson* v. *Jolly* (1)). Further, if the claimant is right in saying that under s. 67 the expiration of a valid notice to quit operates to determine a lease, there can be no lease to surrender once a notice to quit expires and what is the practical importance of the provisions if its operation is confined to the duration of the term contracted for ? Of course if s. 67 has not the effect assigned to it but is subject to some implied qualification this difficulty disappears. But otherwise it must either be acknowledged that sub-s. 82 (1) (a)

(1) (1948) 48 S.R. (N.S.W.) 460 ; 65 W.N. 205.

and (b) (ii) has a very limited operation in protecting sub-lessees or else the expression " the surrender of his lease by the lessee " must be interpreted as extending beyond the surrender of a lease *stricto sensu* and including the giving up by a lessee under a lease which has been terminated by notice to quit of the interest he derives from the protection which s. 62, s. 70 and the other provisions of Part III. of the Act combine to give him. A view of this latter kind was adopted in the Supreme Court. One of the difficulties in giving the provision this extended meaning lies in its history. It comes from reg. 73 of the *National Security* (*Landlord and Tenant*) *Regulations* as substituted by S.R. 1947 No. 31, reg. 27. The previous reg. 73 for which it was substituted was expressed in this respect widely enough to cover the situation and yet it was superseded. But whether or not the material part of s. 82 (1) (a) and (b) (ii) is to be confined in its application to surrenders of leases in the proper sense I do not think that the facts of this case fall within it. This conclusion really depends upon the effect of the course taken by the Public Trustee and by the two sons of Mrs. Denahy. The position of the Public Trustee under s. 61 of the *Wills, Probate and Administration Act* has been very much discussed (See *Ex parte Public Trustee*; *Re Birch* (1)). But it is at least clear that on the death of Mary Denahy the weekly tenancy of the premises vested in him and so did the right which it gave to the reversion upon the sub-tenancies. When the two sons paid rent to the claimant and he gave receipts to the " Estate of the late Mrs. Denahy " it should be inferred, I think, that no new tenancy was formed between them and that the claimant meant only to accept the rent as from the legal personal representative of the deceased whoever that should be or turn out to be. The letter of the Public Trustee appears to me to express no intention of abandoning a possession of the premises to the claimant. It does no more than disclaim legal authority and responsibility as a matter of law. It manifests no intention of affecting rights in any way. Let it be supposed that the two sons may be taken as acting for " the estate " when they vacated their flat. It is an assumption which I think could not be justified unless they afterwards obtained probate and then it could be justified only retrospectively, if at all. But even upon this supposition they vacated only portion of the premises. Mary Denahy had been in possession of the rest of the premises by her tenants and her legal personal representative must be considered as in possession of that part of the premises by the same tenants. Nothing was done to amount to an assumption by the claimant of this

(1) (1951) 51 S.R. (N.S.W.) 345; 68 W.N. 9.

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relation after an abandonment of it to him. I think that " possession " of the premises in point of law must be attributed to the Public Trustee as the repository of the title to the estate and as I have said I do not think he communicated to the claimant any intention to abandon any possession so attributable.

I turn therefore to the examination of the steps in the argument of the claimant by which he seeks to support the conclusion that the jurisdiction of the Supreme Court to entertain this action is not excluded by the *Landlord and Tenant (Amendment) Act* 1948-1949 and that that Act gives the lessees no protection.

The first step I am disposed to concede, namely that the estate must be regarded as vesting in the Public Trustee so that a notice under s. 62 terminating the tenancy might properly be served upon him. This I think is the result of the decisions in England culminating in *Fred Long & Son Ltd.* v. *Burgess* (1) and *Moodie* v. *Hosegood* (2). In the latter case it was not denied that the effect of a notice to quit served on the probate judge was to terminate the tenancy and the House of Lords accepted this position : see per Lord *Morton* (3). In the next place I am equally disposed to concede that the operation of s. 67 is to terminate a lease upon the expiration of a notice to quit validly given upon a ground specified in s. 62 (5) which exists in fact. It must be remembered that the provision now standing as s. 67 was introduced into the *National Security (Landlord and Tenant) Regulations*, where it became reg. 62, in order to overcome the effect of the decision of *Gooch* v. *O'Kane* (4) which depended on the view that the notice to quit did not of itself bring the tenancy to an end : see *Crosisca* v. *Eberle* (5). In *Anderson* v. *Bowles* (6) the following passage occurs : " A body of judicial decision exists for the view that, after a valid notice to quit has been given in accordance with reg. 58 (which corresponds with s. 41 of the Act) (Q.) and expires, a tenancy is brought to an end by virtue of reg. 62 (s. 46), but nevertheless the lessee remains protected against dispossession by the lessor whether by peaceable re-entry or otherwise unless and until an order for possession is made by a court of competent jurisdiction under the statutory provisions and the time for the execution of the order expires, the tenant being liable to pay the rent and observe the other obligations of the tenancy, so far as applicable, in the meantime ". Then is listed a number of cases. For my part I am prepared to accept this view.

(1) (1950) 1 K.B. 115.
(2) (1952) A.C. 61.
(3) (1952) A.C., at p. 69.
(4) (1943) Q.S.R. 246.
(5) (1944) Q.S.R. 99 ; 17 A.L.J. 328 : 18 A.L.J. 233.
(6) (1951) 84 C.L.R. 310, at p. 320.

But it does not appear to me to follow from the termination of the tenancy on 23rd January 1950, that the defendants could be sued in an action of ejectment in the Supreme Court. Even after the termination of the tenancy forming part of the estate of Mary Denahy deceased, the possession of the defendants continued to be a possession held from her personal representative. That is none the less so because the termination of the head tenancy left them without any title as against the claimant to remain in, except in so far as the Act enabled them to do so (*Roe* v. *Wiggs* (1); *Pleasant* v. *Benson* (2)). The direction of the writ to "all persons entitled to defend the possession of the premises" therefore covered the legal personal representative. He might come in by leave and defend. See *Adams* on *Ejectment*, 4th ed. (1846) Ch. 81, where the old practice is discussed. A judgment for the recovery of possession from the defendants would be effectual to end the personal representative's possession by them.

The special position of the Public Trustee could not affect this result, even if it be that, as a mere repository of the estate, his "capacity" does not extend to appearing and defending the action.

The question is whether such a proceeding comes within the fair meaning of the words of s. 62 (1). The words are "to recover possession of the premises from the lessee or for the ejectment of the lessee therefrom". These words should, I think be given the widest meaning of which they are capable. They are obviously directed at all forms of proceeding for obtaining the possession which belongs to or is attributable to the lessee. In s. 62 (3), the correlative provision, the lessor is authorized to take proceedings in a court of competent jurisdiction subject to the prescribed conditions for the recovery of prescribed premises, but in that case the description of the proceedings is not limited by any mention of the character of the person from whom there is to be the recovery. In s. 70 (1) (a) the hardship to be considered is that of the lessee or any other person, and in s. 70 (2) the requirement of suitable alternative premises is made a condition of an order for recovery of any dwelling house in terms capable of including a proceeding directed against anyone and for that matter in any court. In s. 82 (3) and (4) provision is made for the protection of sub-tenants when the lessee receives a notice to quit and is proceeded against. All these provisions show that the plan of the Act is to throw the protection it gives round the tenant and those claiming under him as sub-tenants.

(1) (1806) 2 B. & P. N.R. 330 [127 E.R. 654].

(2) (1811) 14 East 234 [104 E.R. 590].

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The plan makes it important that a wide application should be given to the leading prohibition against proceedings for recovery of possession from the lessee upon which the whole plan hangs. I think therefore 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.

The special situation of the Public Trustee doubtless causes a difficulty but I do not think it should affect the result. It cannot alter the description of the proceedings. In any case *Bucknill* L.J. in *Fred Long & Son Ltd.* v. *Burgess* (1) regards the President of the Probate Division, whose position in this respect corresponds with that of the Public Trustee, as not altogether without power. His Lordship says, " I think that, on principle, and, historically, the vesting of the estate in the President is a positive act with some legal substance. Normally the court, formerly composed of the Probate Judge, appoints a person or persons to deal with the property of the intestate through a grant of administration, but I see no reason why in a case of necessity the President should not have legal power to give directions about the property. If he cannot do so, no one can ".

On the whole I think that s. 62 (1) operates to deprive the Supreme Court of jurisdiction to entertain this action.

It was sought to make a distinction in the case of the sleep-out because of the circumstances in which the defendant Annabel became sub-tenant of that structure and indeed the claimant suggested that the transaction amounted to a surrender of his whole sub-tenancy and the taking of a new one from Mrs. Denahy's sons covering the sleep-out. It is enough to say that, apart from any other reason, as Annabel is a protected serviceman s. 4 (6) of the *Landlord and Tenant* (*War Service*) *Amendment Act* 1949 prevents the application if not the action succeeding.

The appeal should therefore be dismissed with costs.

I may add that I have had the advantage of reading the judgment of *Fullagar* J. whose views, particularly of s. 82 (1) lead to the same conclusion but by very different steps. The difference though not affecting the conclusion upon this appeal might prove important to the claimant when he comes to decide what proceedings he should now take to obtain possession of the premises. For upon the view I have expressed the notice to quit already given might suffice

(1) (1950) 1 K.B., at p. 119.

to support proceedings in a court of petty sessions, but upon the view adopted by *Fullagar* J. another notice to quit, one directed to the sub-lessees, would be necessary.

It seems desirable to say that wisdom lies on the side of the claimant's taking a course which would satisfy the requirements of either view and this he would do by giving a notice to quit to the sub-lessees and in any subsequent proceeding in a court of petty sessions relying on the new as well as the old notice to quit. In this observation I believe that we all agree.

McTIERNAN J. The question is whether the appellant, who is the owner in fee simple of a block of flats, is entitled to the possession of them. He brought an action in ejectment to evict the respondents, and he claims that none of them has any ground upon which to defend the possession of the part of which he or she is in possession. The block of flats comes within the definition of " prescribed premises " in the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.), and each respondent claims in effect that the action is barred by the provisions of that Act. Each respondent relies upon an underlease granted by the lessee of the premises. The appellant claims that the lease was terminated by a notice to quit given under s. 62 of the Act, by virtue of s. 67 of the Act, and that the underleases, being derivative interests only, terminated upon the expiration of the notice to quit: and consequently, none of the respondents has any tenancy which is an obstacle to the appellant's right to enter, as the owner in fee simple of the premises.

The appellant applied to the Supreme Court to strike out the respondents' defences and for an order for judgment. This application was referred to the Full Court, which held that there had been a " surrender " of the lease, within the meaning of s. 82 (1) (b) (ii), and, as the underleases were made in the course of a subletting business, a condition mentioned in s. 82 (1) (a), the subtenants were all in possession under a statutory lease and, as this had not been determined, they had a good defence to the action.

The lease and underleases were all weekly tenancies. The lessee, Mrs. Denahy, and her two sons lived in one flat. She sub-let the other flats, one to each of the respondents. Some time before this action was brought she died; her two sons continued to live in what was their mother's flat. Mrs. Denahy left a will naming her sons executors and they are the only beneficiaries. The will was not proved and no personal representative of any kind was appointed. The Denahys paid the rent under the lease, which their mother had held, to the appellant's agent and received the rent

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payable by the under-lessees. The appellant had recently purchased the premises and he desired to go into possession, apparently to make structural alterations. He directed his agent not to accept any more rent from the Denahys.

The appellant was the lessor of the premises within the meaning of the *Landlord and Tenant (Amendment) Act* 1948-1949. The flats were prescribed premises and he could not recover possession of them otherwise than in accordance with the Act. Mrs. Denahy was the lessee in possession when the appellant acquired the property: he acquired title subject to her weekly tenancy, and if he had desired to take action to recover possession before she died, it would have been necessary for him to give her a notice to quit in pursuance of s. 62, and upon the expiration of the notice to quit proceed against her under the Act for an order for the recovery of the premises. The proceedings would have been determined subject to the provisions in the Act directed to the protection of sub-tenants: s. 82 (3), (4) and (5). The weekly tenancy did not determine at Mrs. Denahy's death and, as it was included in her estate, s. 61 of the *Wills, Probate and Administration Act* 1898-1947 (N.S.W.) applied to it. This section says that from and after the decease of any person dying testate or intestate and until probate or administration or an order to collect is granted in respect of his estate, the real and personal estate of the deceased 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." The lease or weekly tenancy must be deemed by force of s. 61 to have vested in the Public Trustee from the death of Mrs. Denahy.

Apart from s. 62 of the *Landlord and Tenant (Amendment) Act*, the lease would have been held by Mrs. Denahy subject to the condition that the lessor could determine it by a notice to quit given in accordance with the contract of letting. Section 62 altered that position; Mrs. Denahy held the lease subject to the conditions that the lessor could not lawfully determine it except by giving a notice to quit in accordance with s. 62, or recover possession otherwise than in accordance with the Act. The same lease as Mrs. Denahy held must be deemed to have vested in the Public Trustee subject to the conditions implied in s. 61 of the *Wills, Probate and Administration Act*.

The appellant gave a notice to quit to the Public Trustee in pursuance of s. 62 of the Act in order to determine the weekly tenancy which Mrs. Denahy had held. The first question is whether that notice to quit was valid: that is to say whether the Public

Trustee stood in any such legal relation that the giving of a notice to quit in due form to him would operate under the *Landlord and Tenant* (*Amendment*) *Act* to determine the tenancy. *Roper* C.J. in Eq. propounded in *Foy* v. *Public Trustee* (1) a limitation, imposed by the conditions expressed in s. 61, upon the capacity of the Public Trustee to represent the estate of a deceased person in proceedings in equity. Without in any way throwing any doubt upon that judgment, this Court is bound to say in the present case that the question as to the validity of the service of the notice to quit upon the Public Trustee is concluded by *Smith* v. *Mather* (2). That is a decision upon s. 9 of the *Administration of Estates Act* 1925 (15 Geo. 5, c. 23) (Imp.), a provision not in terms identical with s. 61, but to which this section is analogous. The Court of Appeal decided that the service of a notice to quit upon the President of the Probate, Divorce and Admiralty Division was valid by virtue of s. 9 : the reason was that the tenancy subsisted at the time of the death and under s. 9 vested in the President : a landlord who wished to bring to an end a contractual tenancy which was subsisting at the time of the death of the tenant ought to be able to serve a notice to quit to bring it to an end : however, the Court said that the President incurred no financial responsibility. By parity of reasoning, the giving of the notice to quit to the Public Trustee to bring to an end the tenancy of the premises held by Mrs. Denahy and subsisting at her death was warranted under s. 61 of the *Wills, Probate and Administration Act* : See also *Moodie* v. *Hosegood* (3).

The next question is whether the giving of the notice to quit brought the tenancy held by Mrs. Denahy to an end. The giving of the notice to quit, provided in s. 62 of the *Landlord and Tenant* (*Amendment*) *Act*, is a necessary preliminary to proceedings by the lessor against the lessee for recovery of possession, even though, apart from the Act, notice to quit would not be necessary to terminate a tenancy, having regard to its conditions. Having done away with the notice to quit which would be good under a contract of tenancy, if a notice to quit were required, the Act necessarily provides for what is to be the effect on the tenancy of the lessor's giving the statutory notice to quit to the lessee. That is to be found in s. 67. The decisions upon this section do not all give it the same interpretation. According to the interpretation supported by the balance of authority, s. 67 produces the effect that upon the expiration of the time specified in the notice to quit, the contractual

(1) (1942) 42 S.R. (N.S.W.) 209 ; 59 W.N. 142.

(2) (1948) 2 K.B. 212.

(3) (1952) A.C. 61.

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tenancy determines and the rights of the lessee and any under-lessees then depend upon the Act. This interpretation gives effect to the words of the section and is, I think, correct. It follows that upon the expiration of the period specified in the notice to quit given by the appellant, as the lessor, to the Public Trustee, the weekly tenancy which had been held by Mrs. Denahy at her death, and which from then was deemed to be vested in the Public Trustee, came to an end.

The giving of a notice to quit is, by s. 62 (3), made a condition precedent to taking proceedings for the recovery of the possession of prescribed premises by a lessor from the lessee: the grounds of a notice are an essential part of it: the notice served upon the Public Trustee stated the ground upon which it was given. The grounds stated in a statutory notice to quit raise issues upon which the determination of the lessor's claim for possession depends. But the appellant brought an action of ejectment in the Supreme Court to evict the Denahys and the present action to evict the respondents. The ground stated in the notice to quit given to the Public Trustee is irrelevant in either action. It is inconsistent for a lessor to give the statutory notice to quit prescribed as a condition precedent to proceedings under the Act, and to ignore its provisions making courts of petty sessions the exclusive tribunals to determine such proceedings. Section 67 gives to the statutory notice to quit the office of terminating the contractual tenancy, for the purpose of the statutory proceedings which it authorizes. The provision was necessary in view of the supplanting of any contractual notice to quit. It is also inconsistent for the lessor to proceed independently of the Act for the recovery of possession and rely upon the effect of s. 67, ignoring the statutory provisions *ultra* the contract of letting introduced by the Act to protect the possession of the lessee and under-lessee.

The Denahys vacated the flat in which they and their mother lived after they were served with the writ in ejectment issued by the appellant out of the Supreme Court: they were reluctant to engage in litigation. The tenancy of the premises was from Mrs. Denahy's death deemed to be vested in the Public Trustee: that was the situation when the Denahys vacated unless the Public Trustee had surrendered the tenancy or otherwise divested himself of it, if he could do so. The tenancy certainly was never transmitted to or devolved upon the Denahys. The vacation by the Denahys of the flat in which they lived after the death of their mother, who had been the tenant of the flat, could not amount to a surrender of the lease to the appellant. The termination of

the sub-leases could not result from the Denahys' going out of occupation of that flat.

Upon receipt of the notice to quit the Public Trustee informed the appellant that he was " not administering " the estate of Mrs. Denahy : that he had " no interest in the premises to assert " : that s. 61 did not " vest " the estate in him but declares only " that it is deemed so to be vested " (the words of s. 61 are " shall be deemed to be vested ") : that the estate " is merely held during the hiatus of possession and the Public Trustee is merely the repository of the estate " : that " in any contemplated proceedings the Public Trustee would not be a proper party " : and that " he has no powers to exercise and no active duties to perform in connection with the estate of the deceased ". It is not consistent with the Public Trustee's expressed attitude that he was not administering the estate or that he was holding it during the hiatus of possession merely as a repository or that he had no powers to exercise or no active duties to perform, to conclude that what he did was to surrender the tenancy. Whether or not all the assertions made by the Public Trustee are in harmony with s. 61 of the *Wills, Probate and Administration Act*, it is not necessary to decide. The Public Trustee did not intend to disclaim any capacity truly vested in him by the section : and in so far as what he says denies his competency to be the recipient of the notice to quit, it is erroneous in law, having regard to what is decided in *Smith* v. *Mather* (1). The Public Trustee was in law competent to be served with the statutory notice to quit which the lessor gave him. There would be no reason to give the Public Trustee the notice to quit if the lessor *vis à vis* him was not subject to the restrictions imposed by the Act upon the rights of a lessor to recover possession of prescribed premises. The requirement under s. 62 to give the prescribed notice to quit cannot be abstracted from the provisions of the Act governing the eviction of tenants and sub-tenants as the only condition of the Act binding the appellant. Neither can s. 67 be abstracted and used to justify the eviction of sub-tenants independently of the Act, upon the basis of the general rule that under-leases determine when the lessor brings the head lease to an end, and sub-tenants therefore have no rights under the Act after the expiration of the time specified in a notice to quit. The tenant and sub-tenants are entitled to remain in possession until an order for recovery of possession is made in accordance with the Act. Unless the Public Trustee surrendered the tenancy, the appellant was not entitled to bring proceedings for the recovery of the

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possession of the premises otherwise than in accordance with the Act. There is no evidence that the Public Trustee surrendered the tenancy. The Public Trustee was no less competent to be served with a statutory notice to quit given in pursuance of the Act than with the process which the Act requires a lessor to serve upon a lessee in order to bring proceedings for the recovery of possession. It is not necessary to decide whether the Public Trustee would be bound to defend the possession. Obviously there might be cases in which it would be in the interests of the beneficiaries of the estate that he should do so. In the present case, Mrs. Denahy's sons would not be practically affected by an order giving the appellant possession. The Public Trustee had no duty to notify any of the respondents, as sub-lessees, of the receipt of the notice to quit. In the proceedings, however, each of them would have been entitled under s. 82 (4) to be heard. In truth, the appellant's action of ejectment is brought in contravention of the Act, particularly ss. 62, 69 and 70.

In regard to the respondent Annabel, he is a " protected person " under the *Landlord and Tenant* (*War Service*) *Amendment Act* 1949, and a special submission based on that status was made on his behalf. According to the finding which *Street* C.J. made upon the evidence, this respondent did not surrender his lease to the appellant and was in possession under an agreement for a sub-tenancy made with Mrs. Denahy. Hence his position is in substance identical with the other respondents.

For these reasons I am of opinion that it was not established that the respondents respectively have no rights as sub-lessees to be in the possession of the premises. The appellant's application that the defence of each respondent be struck out and judgment be entered for him upon the basis that it was proved that when he brought the action he was entitled to possession was rightly dismissed.

I should dismiss the appeal.

WEBB J. I would dismiss this appeal.

The appellant required possession of the premises to reconstruct them, as he stated in his notice to quit. To make the notice effective he was bound so to state this requirement : see s. 62 (5) (m) and s. 66 of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1949 (N.S.W.). There is no reason for regarding the statement of the ground for the notice as a mere formality : in proceedings in which the notice is relied on it has to be the subject of evidence and of adjudication. But the only competent court for the purpose of

s. 62 is a court of petty sessions, as s. 69 provides. Therefore the Supreme Court had no jurisdiction in any proceedings depending on the notice to quit.

If this lease had been surrendered then the sub-lessees thereupon became lessees under s. 82 (1) (b) (ii) and proceedings could properly have been taken against them only in the court of petty sessions. But in my opinion there was no surrender. A surrender to have been effectual must have been made by the lessees, Mrs. Denahy, or by her legal personal representative, the Public Trustee. Now it is not claimed that she surrendered the lease, but that the Public Trustee did so, or that her sons did. Her sons were the only executors and beneficiaries under her will. But the will has not been proved. As to the Public Trustee's position pending a grant of probate, I think it is the same as that of the President of the Probate Division pending a grant of letters of administration in intestacy, as stated in *Smith* v. *Mather* (1), which I am unable to distinguish because of any difference between the New South Wales and English statutes. However, the Public Trustee's disclaimer of authority or function as a matter of law did not amount to a surrender. Such consequences could not properly be attached merely to his erroneous opinion as to the law. And the Denahy brothers had no lease to surrender: neither the unproved will nor their intermeddling could give them the lease, or enable them to create a sub-lease. Further I can see no evidence of any relationship between the Denahy brothers and the Public Trustee that could have made their acts binding on him, as the legal personal representative of Mrs. Denahy, that is to say, no evidence that warrants the conclusion that in giving up possession of the premises they brought about a surrender by the Public Trustee, as that required some action on his part, i.e. the expression of an intention to surrender, or the taking up of a position from which such intention could be presumed.

FULLAGAR J. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales. The appellant is the claimant on a summons in ejectment against three defendants. The facts of the case may be stated quite shortly.

For many years before 1949 Mrs. Mary Denahy had been tenant of a residential building at 102 Bondi Road, Bondi. Her landlord was the owner of the freehold, and her tenancy was from week to week. She carried on a business of sub-letting portions of the building. One portion was occupied by herself and her two sons. The rest was sub-let in three portions to the three defendants respectively,

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Mrs. Hogan, Mr. Annabel and Mr. Williams. The sub-tenancy was in each case from week to week. This was the position when, on 4th April 1949, the claimant, Mr. Andrews, purchased the freehold of the premises. The contract was completed by conveyance to Andrews on 4th July 1949.

On 6th April 1949—i.e. after the making of the contract but before conveyance—Mrs. Denahy died. She left a will, by which she appointed her two sons executors. The two sons were also the only beneficiaries under the will. No application for probate of this will was ever made. After Mrs. Denahy's death her two sons continued to live in that portion of the premises in which they had lived with their mother, and proceeded to collect the respective rents of the three sub-tenants. They asked the claimant to grant them a tenancy of the premises, but this was refused. They paid rent regularly, however, to the claimant's agent, receipts being given in the name of " the estate of the late Mrs. Denahy ".

On 19th December 1949, the claimant caused to be served on the Public Trustee of New South Wales a notice to quit on one of the grounds " specified " in s. 62 (5) of the *Landlord and Tenant (Amendment) Act* 1948-1949. This notice expired on 23rd January 1950. On 25th January the claimant demanded possession of the premises from Mrs. Denahy's sons, and on 7th February he issued a summons in ejectment in which they were the named defendants. The summons was served on them, but it was not proceeded with, for on 14th March 1950, Mrs. Denahy's sons went out of possession. When they left, they directed the sub-tenants, who had hitherto paid their rents to them, to pay those rents in future to the claimant. Two of them, Mrs. Hogan and Mr. Williams, tendered rent to the claimant, but he refused to accept it, denying that any tenancy subsisted between him and either of them. It does not appear whether Annabel tendered any rent to the claimant or not. Presumably, though this does not clearly appear, the claimant entered into possession of the portion of the premises vacated by Mrs. Denahy's sons.

The " ground " stated in the notice to quit which the claimant had caused to be served on the Public Trustee was that he reasonably required the premises for purposes of reconstruction. This is the ground " specified " in s. 62 (5) (m) of the *Landlord and Tenant (Amendment) Act* 1948-1949. The reason for serving the notice on the Public Trustee is to be found in s. 61 of the *Wills, Probate and Administration Act* 1898-1947, which provides that, from and after the decease of any person dying testate or intestate, and until probate or administration is granted, his real and personal estate

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. The service of the notice seems to have raised alarm in the breast of the Public Trustee, but he responded in firm tones in a letter of 16th January 1950, to the claimant's solicitors. He said that Mrs. Denahy's estate was not "vested" but only "deemed to be vested" in him. He said that he had no interest in the premises to assert, that the estate was "merely held" by him "during the hiatus of possession", and that he was "merely the repository of the estate". He added that he would not be a proper party to any contemplated proceeding, and that he had no powers to exercise and no active duties to perform in connection with the estate.

The summons in ejectment with which we are now concerned was issued on 2nd June 1950. On 31st August 1950, the claimant issued a summons asking that the appearance and particulars of defence of each defendant be struck out, and that he be permitted to enter judgment forthwith, upon the ground that the defendants had no defence to the action. This summons was referred by *Herron* J. to the Full Court. The Full Court dismissed the summons, and from that dismissal the claimant appeals to this Court.

It does not appear to have been disputed at any stage that the notice to quit was in itself a valid notice, or that the premises were in fact reasonably required by the claimant for the purpose stated therein. Proceeding on this assumption, the argument of the claimant, though it raises questions of very considerable difficulty, was very clearly put by Mr. *Myers*. It proceeds in three steps. (1) The Public Trustee was the proper person on whom to serve the notice to quit. (2) Notice to quit having been duly given, it operated, under s. 67 of the *Landlord and Tenant (Amendment) Act*, to terminate as from the date of its expiration (23rd January 1950) the tenancy which had been held by Mrs. Denahy. (3) On the termination of that tenancy any rights which the defendant sub-tenants may have had were extinguished. The Act does not protect them, and they are subject to be ejected by proceedings at common law.

The Full Court expressed no opinion as to the correctness of the first two of the claimant's propositions. The view taken appears to have been that at some stage s. 82 (1) operated on the situation so as to create the direct relation of landlord and tenant between the claimant and the defendants, so that (presumably) the claimant could only eject them by giving notice to quit to them and then proceeding against them under the Act in a court of petty sessions.

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Section 82 (1) provides (so far as directly material, and subject to a condition which was admittedly fulfilled) that, where a lessee has ceased to be in possession of premises following upon a surrender of his lease by the lessee, a sub-lessee shall (if he is in possession of any part of the premises sub-let to him) be deemed to have become the lessee thereof from the lessor. The question of the applicability of this sub-section was regarded as turning on the question whether the word " surrender " was used in its technical sense or in some other and wider sense. If it was used in its technical sense, it was apparently thought that the facts did not disclose any surrender either express or by operation of law. Their Honours, however, treated the word as bearing a meaning different from that which it bears as a technical term of the law, and, giving the word an extended meaning, were able to hold that the sub-section protected the defendants in this case. It is not expressly stated what act or acts by what person or persons were regarded as amounting to a surrender within the enlarged meaning attributed to that word.

The ground of the decision is, at first sight, somewhat surprising, for two reasons. In the first place, the word " surrender " is a well-known technical term of the law relating to landlord and tenant, and, when it is found in a statute relating to the law of landlord and tenant, there must be the strongest reasons for giving it its technical meaning. In the second place, the view of the Full Court seems paradoxical, because no " surrender " which falls short of an effective surrender under the general law could affect the continuance of a head lease, so that no under-tenant would seem to stand in need of the protection given him by the construction of s. 82 (1) which is adopted. Despite these considerations, however, I am of opinion that this case does turn on s. 82 (1), and, although my view of that sub-section may not be quite the same as that of the Full Court, I am of opinion that the decision was correct.

On the whole the clearest way of dealing with a distinctly difficult case seems to be to take the three steps in the plaintiff's argument and deal with them in order.

(1) The claimant's first step is that service of the notice to quit on the Public Trustee on 19th December 1949 was effective service of a notice to quit under the *Landlord and Tenant (Amendment) Act*. Now, it seems very clear that the tenancy subsisting between the claimant's vendor and Mrs. Denahy did not come to an end with the death of the latter on 6th April 1949. It was part of her personal estate, and, under English law, would have vested in the executors appointed by her will. Since, however, s. 61 of the *Wills, Probate and Administration Act* 1898-1947 applies to persons dying

testate as well as to persons dying intestate, the tenancy vested in the Public Trustee. On conveyance of the freehold to the claimant on 4th July 1949, the reversion became vested in the claimant, but the tenancy remained vested in the Public Trustee. The words " lessor " and " lessee ", by virtue of s. 8 of the *Landlord and Tenant (Amendment) Act*, include " successors in title ". At this stage, therefore, there was in existence a lease, within the meaning of that Act, under which the claimant, as successor in title to his vendor, was lessor, and the Public Trustee, as successor in title to Mrs. Denahy, was lessee.

The " lease " of the premises being vested in the Public Trustee, and he being the lessee of the premises within the meaning of the *Landlord and Tenant (Amendment) Act*, it would seem to follow that he must be the proper person to be served with a notice to quit under the Act. And this view has been accepted in analogous circumstances by the Court of Appeal in England in two recent cases. These are *Smith* v. *Mather* (1) and *Fred Long & Son Ltd.* v. *Burgess* (2). The main question considered in *Smith* v. *Mather* (1) and in an earlier case of *Thynne* v. *Salmon* (3) was whether a deceased tenant's children, who had resided with him, were entitled to certain rights under a provision in the English legislation. On this point both *Thynne* v. *Salmon* (3) and *Smith* v. *Mather* (1) have been overruled by the House of Lords in *Moodie* v. *Hosegood* (4). The decision of the House of Lords, however, does not seem to affect either *Smith* v. *Mather* (1) or *Fred Long & Son Ltd.* v. *Burgess* (2) as authorities for the proposition that, in the circumstances of the present case, service of a notice to quit on the Public Trustee would be effective service of a notice to quit under the Act. The position might be different if Mrs. Denahy's sons fell within the terms of s. 83 of the Act, but it is clear that they did not. The first step in the claimant's argument must be taken to be sound.

(2) The claimant's next step is to say that, when the notice to quit expired on 23rd January 1950, the lease which had subsisted between him and the Public Trustee was terminated by force of s. 67 of the Act. The correctness of this step can only be conceded subject to a qualification. Section 67 provides that a valid notice to quit given under the Act shall operate so as to terminate the tenancy of the premises at the expiration of the period specified in the notice. Section 67, and its counterparts in other legislation *in pari materia*, have caused a good deal of difficulty. The reason for the insertion of such a provision in the *National Security (Landlord and Tenant)*

(1) (1948) 2 K.B. 212.
(2) (1950) 1 K.B. 115.
(3) (1948) 1 K.B. 482.
(4) (1952) A.C. 61.

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Regulations, which have been more or less closely copied in the existing State Acts, seems to have been that, under certain State laws, certain summary proceedings for ejectment were only available where a tenancy had been " terminated ", and it was successfully argued more than once that a notice to quit given under the regulations did not have the effect of terminating the tenancy to which it related. The introduction of a provision in the terms of s. 67 effectively removed this difficulty, but created difficulties of its own. In my opinion, however, the position must now be taken to be that stated in a passage in a judgment in which I joined with my brothers *Dixon*, *Williams* and *Kitto* in *Anderson* v. *Bowles* (1). The view there indicated is that, after a valid notice to quit has been given under the Act and has expired, the tenancy comes to an end by virtue of s. 67, " but nevertheless the lessee remains protected against dispossession by the lessor . . . unless and until an order for possession is made by a court of competent jurisdiction under the statutory provisions and the time for the execution of the order expires, the tenant being liable to pay the rent and observe the other obligations of the tenancy, so far as applicable, in the meantime ". This view has the practical effect of assimilating the position to that which exists, by virtue of express provision, under the *Rent Restriction Acts* (Imp.).

The position stated in *Anderson* v. *Bowles* (2) most probably needs qualification in a case in which the " lessee " for the purposes of the Act is the Public Trustee, because it may very well be that the Public Trustee is not personally liable for rent or for performance of the obligations placed on the lessee by the lease. But I can see no reason for thinking that his position is not otherwise covered by the passage cited from *Anderson* v. *Bowles* (1). The Public Trustee's " lease " was " terminated ", but he was still a lessee within the meaning of the Act and entitled, as such, to the protection of the Act. I would think that possession by Mrs. Denahy's sons was possession by him, and that the only way in which the claimant could obtain possession from him was by proceeding against him under the Act in a court of petty sessions. 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.

(1) (1951) 84 C.L.R. 310, at p. 320. (2) (1951) 84 C.L.R. 310.

But, while it can hardly be doubted that the position just outlined was the position subsisting at the date of the expiry of the notice to quit, it seems to me that it was radically altered when the sons of Mrs. Denahy went out of possession on 14th March 1950. The letter of the Public Trustee of 16th January had, of course, of itself, no legal effect whatever. But what was happening, and what happened later, must be viewed in the light of the attitude expressed by the Public Trustee in that letter. Mrs. Denahy's sons were in immediate possession of the premises, occupying part themselves, and receiving the rents of the other parts. They were executors and beneficiaries under their mother's will. They were paying rent to the owner of the freehold, and the rent was being received as on behalf of the estate of Mrs. Denahy. There may be something to be said for the view that a new tenancy was created as between the claimant and Mrs. Denahy's sons, but, having regard to all the circumstances enumerated above and to the fact that the claimant expressly refused to grant a tenancy to Mrs. Denahy's sons in their own right, I am of opinion that the only view really possible is that the possession of Mrs. Denahy's sons was the possession of the Public Trustee, in whom her " lease " was legally vested, and that, when they went out of possession, the Public Trustee must be taken to have gone out of possession. From this point onwards the Public Trustee had, in my opinion, no interest in the premises, and it is for this reason that I am unable to regard the position as falling within the prohibition of s. 62 of the *Landlord and Tenant (Amendment) Act*. That section prohibits proceedings by a lessor " to recover possession of the premises from the lessee or for the ejectment of the lessee therefrom ". After 14th March 1950, there was no " lessee " in possession, no " lessee " to be ejected. The Public Trustee was not in possession, and the under-lessees were not " lessees ".

(3) When this point is reached, there seems to be no answer to the claimant's argument, unless it is to be found in s. 82 (1) of the Act. And the third step in the claimant's argument really is that it is impossible to bring the case within s. 82 (1), (2) (a), because it applies only to cases where there has been a surrender, and obviously, he says, there could be no " surrender " of a lease which has been terminated by force of s. 67 of the Act. It would probably be conceded—at any rate I think it would have to be conceded—that the defendants would have such protection as is given them by sub-ss. (2), (3) and (4) of s. 82 of the Act so long as the Public Trustee remained in possession. But he went out of possession. The protection which they enjoyed while he was in possession, and

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therefore a necessary party to legal proceedings, is thus withdrawn. His going out of possession, however, could not amount to a surrender because his " lease " had already been terminated on 23rd January, when the notice to quit expired. Therefore, the claimant says, s. 82 (1) cannot be applicable.

Now, if we regard s. 82 (1), so far as it deals with surrenders, as a general attempt to give to under-lessees a protection which they would not otherwise have had, the section seems incomprehensible. Indeed, so regarded, it could only be explained by the supposition that the draftsman was under a misapprehension as to the position under the general law, just as the draftsman of another provision in the corresponding Queensland Act seems to have misunderstood the position at common law : see *Massart* v. *Blight* (1). One would be driven to the conclusion that the draftsman thought that, under the general law, the surrender of a head lease had the effect of destroying an underlease. This, of course, was not so. At common law surrender of a head lease, unlike forfeiture, did not affect the rights of an under-lessee. So far as an under-lessee is concerned, as *Coke* says, " the estate surrendered hath, in consideration of law, a continuance ". " It is clear ", said *Cockburn* C.J. in *Mellor* v. *Watkins* (2) " that when a person voluntarily surrenders his lease, he cannot by so doing put an end to an under-tenancy created by himself ". And in England since, at latest, the enactment of 8 & 9 Vict., c. 106, s. 9, and in New South Wales since, at latest, the original enactment of s. 122 of the *Conveyancing Act* 1919-1943, the position has been that a head lessor, upon the surrender of the lease, becomes entitled to the reversion expectant upon any immediate under-lease, the under-lessee becoming his immediate tenant on the terms of the under-lease. The head lessor, *vis à vis* the under-lessee, " is in the position of an assignee of the reversion " expectant on the under-lease : see *Plummer and John* v. *David* (3). This is the very position which s. 82 (1) of the *Landlord and Tenant (Amendment) Act* seems to set out to create. The sub-section thus seems entirely unnecessary. It might, no doubt, be suggested that the draftsman was under another and different misapprehension, and that, not knowing what the word " surrender " meant in law, he used it as meaning or including something which fell short of an effective legal surrender. But the provision in question cannot be explained on this basis. So regarded, it would be not less superfluous. For nothing short of an effective legal surrender could affect the

(1) (1951) 82 C.L.R. 423.
(2) (1874) L.R. 9 Q.B. 400, at pp. 404, 405.
(3) (1920) 1 K.B. 326, at p. 330.

relation of landlord and tenant subsisting under a head lease. If on the one hand, there were some "surrender" which fell short of an effective legal surrender, the rights of an under-lessee would, be unaffected because the head lease would simply continue to subsist. If, on the other hand, there were an effective legal surrender, the rights of an under-lessee would, by reason of the special rule of the common law, be unaffected, except that he would henceforth hold as tenant of the head lessor.

It is not, however, necessary to suppose either that the draftsman did not know the meaning of the word "surrender" as a legal term, or that he was labouring under a mistake as to the general law. For, in my opinion, he was setting out not to give a general protection to under-tenants but to deal with a special situation which might be created by the Act itself, to deal indeed with just such a situation as has arisen in this case. If a valid notice to quit were given by a head lessor to his lessee, the head lease would be terminated by force of s. 67 of the Act, and there would be no rule of the general law which would protect an under-lessee. His under-lease would terminate with the termination of the head lease. So long as the head lessee relied on his position under the Act, he could only be ejected by proceedings in a court of petty sessions under the Act. If such proceedings were taken, the under-lessee was to be protected by sub-ss. (2), (3) and (4) of s. 81, and he could come in and rely on "hardship" to himself as "another person" within the meaning of s. 70. But it was necessary to deal with the case where the head lessee did not choose to avail himself of the protection given him by the Act. I think it was conceived—probably rightly—that, unless an actual surrender took place, the head lessee had possession, so that the head lessor could not get possession except by proceedings *against him* under the Act. But, if an actual surrender did take place, the legal possession ceased to be in the head lessee, so that the under-lessee could not, if proceedings were taken against him at common law, rely on the protected "possession" of the head lessee. It was with the situation thus conceived that the draftsman set out to deal.

It may be readily conceded that, even on this view, there is not a strictly accurate use of terms in s. 82 (1). For, strictly speaking, there could not be, in any imaginable sense, a "surrender" of a lease which had been terminated by force of s. 67. Indeed, it might be said that it is inaccurate to speak of a person whose lease has been terminated as a "lessee". But such inaccuracy as may be said to be involved is very natural and understandable. Section 82 (1)

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proceeds really, I think, on the view (reflected in other provisions of the Act) that a lease which has been terminated by force of s. 67 must be regarded as still subsisting for certain purposes. In England it has become common usage to speak of a " contractual tenancy " and a " statutory tenancy ", the former referring to a relation which subsists by virtue of the general law, and the latter to a relation which subsists only by virtue of a special statute. In Australia we have been, largely because of certain differences in our legislation, somewhat reluctant to employ these terms. But, so long as they are not misunderstood or used in varying senses, they are useful enough. And I think they are useful in the present case. I do not think that the draftsman of s. 82 (1) was ignorant of the legal meaning of the word " surrender ". His conception, in my opinion, was of a statutory tenancy, subsisting after the termination of a contractual tenancy under s. 67. When s. 82 (1) speaks of a surrender, it is referring to a surrender of a statutory tenancy. Whatever would have amounted to a surrender of a contractual tenancy is regarded as amounting to a surrender of a statutory tenancy. There is no need to treat the word " surrender " as having any wider or narrower meaning than that which it has as one of the terms of the law. The real function of s. 82 (1), so far as it relates to " surrenders ", is performed if we give to the word its recognized legal meaning.

Two questions then seem to arise. A surrender of a lease can only be effected by the owner of the term to the owner of the reversion. Here the Public Trustee was the owner of the term. The first question, therefore, is whether the Public Trustee was capable of surrendering a term vested in him. And the second—which only arises if the first is answered in the affirmative—is whether he did surrender the lease vested in him in this case.

It is unnecessary to attempt to define generally the position of the Public Trustee under s. 61. That he has *some* rights and powers would seem almost necessarily to follow, though it may very well be that he has no active duties. In New South Wales a very restricted view of his position seems to have been taken, except perhaps by *Harvey* C.J. in Eq. in *Sydney Municipal Council* v. *Hayek* (1). Reference may be made to *In re Broughton* (2), *Foy* v. *Public Trustee* (3), and *Triggs* v. *Byron* (4). The observations of *Bucknill* L.J. in *Fred Long & Son Ltd.* v. *Burgess* (5), should, however, be noted. In England the corresponding vesting, which

(1) (1930) 48 W.N. (N.S.W.) 11.
(2) (1902) 19 W.N. (N.S.W.) 69.
(3) (1942) 42 S.R. (N.S.W.) 209; 59 W.N. 142.
(4) (1950) 67 W.N. (N.S.W.) 183.
(5) (1950) 1 K.B., at p. 119.

takes place only on intestacy, is in the President of the Probate Divorce and Admiralty Division. *Bucknill* L.J. began by saying that " on principle, and historically, the vesting of the estate in the President is a positive act with some legal substance ". I would, very respectfully, agree with this, and with the passage which follows in the judgment. In *Chan Kit San* v. *Ho Fung Hang* (1) Lord *Davey* was dealing only with the capacity of the registrar to maintain a suit for a partnership account, the point at issue being the date as at which time would begin to run for the purposes of a statute of limitation. In *Daily Pty. Ltd.* v. *White* (2), *Herron* J. held that an assignment by an executor before probate was of no effect in New South Wales because the estate was vested not in him but in the Public Trustee. It does not, of course, necessarily follow that the Public Trustee *could* make a valid assignment.

It does, however, seem necessary in this case to consider the more limited question whether the Public Trustee could effectively surrender a lease which was vested in him under s. 61. This question was answered in the negative by *Herron* J. in *Triggs* v. *Byron* (3). 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* (3) 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. In *Francis Longmore & Co. Ltd.* v. *Stedman* (4) it seems again impossible to regard the mere inactivity of the Public Trustee as amounting to a surrender, and, if there were no surrender, it is difficult to see how the tenancy could be said to have come to an end. For this reason I think, with respect, that the correctness of the decision in that case must be regarded as very doubtful. *Barry* J. did not advert in his judgment to the question of the capacity of the Public Trustee to surrender a lease vested in him : indeed he does not appear to have adverted to the question of surrender at all. In my opinion, the Public Trustee

(1) (1902) A.C. 257, at p. 261.
(2) (1946) 63 W.N. (N.S.W.) 262.
(3) (1950) 67 W.N. (N.S.W.) 183.
(4) (1948) V.L.R. 322.

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—both in Victoria and in New South Wales—is legally capable of surrendering a lease vested in him. And, if he could surrender a " contractual " tenancy for the purposes of the general law, he could surrender a " statutory " tenancy for the purposes of s. 82 (1) of the *Landlord and Tenant (Amendment) Act*.

The only remaining question seems to be whether there was a surrender of the tenancy originally held by Mrs. Denahy. That question, if my view of s. 82 (1) is correct, is whether there has been a surrender of a statutory tenancy, and it is to be tested by asking whether what was done would have amounted to a surrender of a contractual tenancy if there had been a contractual tenancy. In my opinion, there was such a surrender.

The question whether a surrender of a lease has taken place has most commonly arisen in an action by the lessor for rent or for breach of covenant, the lessee setting up the surrender as destroying the relation of landlord and tenant and discharging him from his obligations under the lease. A surrender could not be effected by unilateral act: the assent of both parties to the lease was required: see *Peto* v. *Pemberton* (1). Section 3 of the *Statute of Frauds* provided that surrenders of leases must be by deed or writing, but this provision did not affect " surrenders by act or operation of law ". The cases cited in *Phene* v. *Popplewell* (2), show that much difficulty was felt about what constituted a surrender by operation of law. No mere abandonment of possession by the lessee could, of course, operate as a surrender. Any such abandonment must be accepted by the lessor, and, generally speaking, the only way in which such an acceptance could be shown was by proof of something in the nature of a resumption of possession by the lessor. The difference between an " express " surrender and a surrender by operation of law seems indeed to have been the difference between an express agreement to give and take possession (which, after the statute, could only be proved by writing) and an agreement to give and take possession evidenced only by acts of the parties. So in *Phene* v. *Popplewell* itself, (3), we find *Erle* C.J. saying :—" This mode of putting an end to a tenancy "—i.e. surrender by operation of law—" has undoubtedly been productive of much litigation from the time of Lord Ellenborough downwards. But I think the cases of *Grimman* v. *Legge* (4) and *Dodd* v. *Acklom* (5) have put the matter upon a proper foundation :

(1) (1628) Cro. Car. 101 [79 E.R. 689].
(2) (1862) 12 C.B.N.S. 334 [142 E.R. 1171].
(3) (1862) 12 C.B.N.S., at p. 340 [142 E.R., at p. 1174].
(4) (1828) 8 B. & C. 324 [108 E.R. 1063].
(5) (1843) 6 M. & G. 672 [134 E.R. 1063].

anything which amounts to an agreement on the part of the tenant to abandon and on the part of the landlord to resume possession of the premises amounts to a surrender by operation of law ".

Here the Public Trustee did nothing himself by way of abandoning possession. But I think that he must be regarded as being in possession under the head " lease " by the two sons of Mrs. Denahy. Only the legal owner of a term can surrender the term, but the acts of Mrs. Denahy's sons, who remained in immediate possession with the tacit acquiescence of the legal owner of the term (the Public Trustee) must be regarded as the acts of the legal owner of the term.

We must now approach the facts of the present case on the supposition that after 23rd January 1950, there was still a " contractual " tenancy subsisting between the claimant and the Public Trustee. Mrs. Denahy's sons did everything possible in the way of yielding up possession. They vacated the part of the premises actually occupied by them, and they directed the defendants to pay their rent to the claimant. It is important to remember that the claimant was demanding possession : he had issued a summons in ejectment against Mrs. Denahy's sons. The claimant did not accept rent tendered to him by the defendants after the departure from the scene of Mrs. Denahy's sons—doubtless because he feared that to do so might lead to the inference of a new tenancy between himself and them. But he very definitely asserted a right to possession. He not only demanded possession from the defendants, but issued the summons in ejectment with which the Full Court dealt. By doing these things he unequivocally accepted the abandonment of the premises by Mrs. Denahy's sons and actively asserted a claim to immediate possession. It seems out of the question that he should thereafter be able to claim rent from Mrs. Denahy's sons or from the Public Trustee. What was done was ample, in my opinion, to establish a surrender by operation of law if the tenancy had been a " contractual " tenancy. And it amounted to a surrender of the " statutory " tenancy within the meaning of s. 82 (1) of the Act. That sub-section applies to the case, and the defendants can only be ejected by proceedings against them under the Act in a court of petty sessions.

For these reasons I am of opinion that the judgment of the Full Court was right, and that this appeal should be dismissed.

KITTO J. The appellant in this case is the claimant in an action of ejectment in the Supreme Court of New South Wales, in which he seeks to recover possession of certain land as the registered proprietor of an estate in fee simple therein. Upon the land is a

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residential building, and each of the defendants is in occupation of a portion of that building. The defendants entered appearances and gave particulars of defence limited to the several portions of the building they respectively occupied. The claimant, contending that the defendants had no defence to the action, applied in chambers for an order striking out the appearances and particulars of defence and permitting him to enter judgment and issue execution forthwith. The Full Court of the Supreme Court, to which the application was referred, refused to make the order, and from that refusal this appeal is brought by special leave.

On the hearing of the application affidavit evidence was tendered by all parties, and the few facts I shall need to state are common ground. The premises were let by the claimant's predecessor in title to a Mrs. Denahy on a weekly tenancy. By the time the fee simple was transferred to the claimant, Mrs. Denahy had died, but her tenancy was still subsisting and no notice to determine it had been served. She had sub-let to the defendants the parts of the premises which they now respectively occupy, and nothing had been done during her lifetime to terminate the tenancies. She had been in occupation of the remainder of the premises herself, and after her death her two sons remained in occupation thereof for a time. No representation to her estate has ever been taken out, and her property therefore remains vested in the Public Trustee, by virtue of s. 61 of the *Wills, Probate and Administration Act* 1898-1947 (N.S.W.).

The claimant desired to obtain vacant possession of the premises for purposes of reconstruction, and the first step he had to take was to determine by an appropriate notice to quit the tenancy which belonged to Mrs. Denahy's estate. The premises, however, were prescribed premises within the meaning of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.) and the claimant was the "lessor" of them within the definition of that word contained in s. 8 (1) of the Act, because he was the successor in title of the original lessor. He was therefore precluded by s. 62 (1) from giving any notice to terminate the tenancy, and from taking or continuing any proceedings to recover possession of the premises from the lessee, except as provided by Part III. of the Act. Section 62 (3) permitted him, subject to the Part, to take proceedings in any court of competent jurisdiction for an order for the recovery by him of the premises, if before taking the proceedings he had given to the lessee, upon one or more of certain prescribed grounds but upon no other ground, notice to quit in writing for a period determined in accordance with s. 63 and that period of notice had

expired. By s. 69, courts of petty sessions, and those courts only, are courts of competent jurisdiction for the purposes of s. 62.

The claimant served a notice to quit on the Public Trustee. The notice admittedly was given upon a prescribed ground and was for a period determined in accordance with s. 63. It satisfied all the conditions of a good notice to quit at common law, and it expired before the date upon which the claimant alleged in his writ that he was entitled to possession. But there are four questions which would have to be answered in the claimant's favour before his application for judgment could be granted. The first is whether in the circumstances of the case the Public Trustee was the lessee within the meaning of s. 62 (1) and a proper recipient of a notice to quit. This question should, I think, be regarded as concluded in the claimant's favour by *Fred Long & Son Ltd.* v. *Burgess* (1) and *Moodie* v. *Hosegood* (2). See also some observations by *Herron* J. in *Triggs* v. *Byron* (3). The second question is whether, having regard to the provisions of the Act, the tenancy which had belonged to Mrs. Denahy was effectually determined by the expiry of the notice to quit. In order to answer this question it would be necessary to consider the curiously expressed provisions of s. 67, the decisions mentioned in *Anderson* v. *Bowles* (4), and the cases of *Krupa* v. *Zacabag Pty. Ltd.* (5), and *Furness* v. *Sharples* (6). The third question is whether, if Mrs. Denahy's tenancy was duly determined, the defendants automatically lost all right of possession as against the claimant. On this question it would be necessary to consider the provisions of s. 82 of the Act. The fourth question is whether, if all the other questions should be answered favourably to the claimant, the action was within the jurisdiction of the Supreme Court, having regard to ss. 62 (1), 62 (3) and 69.

I have come to the conclusion that the last question should be answered in the negative, and that being so, it is unnecessary for me to consider the second and third. Section 62 (1), read with ss. 62 (3) and 69, provides, *inter alia*, that, except in a court of petty sessions, 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. In my opinion, in relation to the premises the subject of the present action, the claimant is the lessor, the Public Trustee is the lessee, and the action falls within the prohibition of s. 62 (1). I shall state my reasons as briefly as I can.

(1) (1950) 1 K.B. 115.
(2) (1952) A.C. 61.
(3) (1950) 67 W.N. (N.S.W.) 183, at p. 186.
(4) (1951) 84 C.L.R. 310, at p. 320.
(5) (1950) 50 S.R. (N.S.W.) 304; 67 W.N. 221.
(6) (1950) 51 S.R. (N.S.W.) 13; 68 W.N. 18.